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Supreme Court of the United States

OCTOBER TERM 1932.

Nos. 98, 99, 100.

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY,
Petitioners,
vs.
THE STATE OF ALABAMA.

HAYWOOD PATTERSON,
Petitioner,
vs.
THE STATE OF ALABAMA.

CHARLIE WEEMS and CLARENCE NORRIS,
Petitioners,
vs.
THE STATE OF ALABAMA.

BRIEF FOR PETITIONERS.

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SUBJECT INDEX.

	PAGES
Opinions below	1-2
Jurisdiction	2-5
Statement of cases	6-33
Course of events	6-17
Alleged rape on March 25; arrest that day	6-7
Mayor and local leaders "plead for peace" March 25	8
Governor at Sheriff's request calls out National Guard March 25	8
Special grand jury summoned and special session of court called March 26	8-9
Defendants indicted March 31	9
Whole Scottsboro bar "appointed" to represent defendants on arraignment March 31	9-10
Appointment invalid	10
Writ of arrest issued and Sheriff directed to serve jurors March 31	10
Sheriff's return April 4	10
No counsel employed by defendants and no opportunity to employ	10
No true appointment of counsel on April 6; lawyer who volunteers accepted	10-11
Change of venue denied	11-12
No severance demanded by defense	12
Severances obtained by prosecution	12
Defendants rearraigned April 6	12-13

PAGES

Weems trial April 6; Patterson trial April 7; Powell trial April 8 13
Negroes excluded from juries pursuant to "custom of long standing" 13
Jurors not interrogated about race prejudice 13
Only defense witnesses negroes under indictment 14
Defense declines to sum up to juries 14
Charges to the jury 14
Verdicts imposing death penalty 15
Sentence April 9 15
Appeal taken April 9 15
Motions for new trial 15-17
Defendants confined under military guard 17-18
Defendants of immature years 17-18
Defendants not residents of Alabama 18
No opportunity to employ counsel or communicate with families 18
Sentiment of community and atmosphere of trials 19-26
Inflammatory publications 19
Crowds 20-21
Size 20
Temper 21
Trial court orders soldiers to search citizens for arms 21
Military continuously present 22-23
Machine guns; tear gas bombs 23
Demonstrations 23-25
Applause 23-24
Music 24-25
Parents afraid to visit petitioners 25
Petitioners brought to trial at night 25
Guilt assumed by community 25-26

PAGES

Jurors share community sentiment 26-27

Internal evidence of lack of calmness and deliberation 27-32

Trial judge swayed by community feeling 32-33

Errors relied upon; summary of argument 34-35

Point I. Trial not fair and impartial; conviction and sentence a deprivation of liberty and life without due process: The cases identical in essence with *Moore* vs. *Dempsey* 36-47

Point II. Effective right to counsel denied and due process of law withheld 48-59

Point III. Systematic exclusion of negroes from juries a denial of equal protection 60-62

Point IV. State Court's misconceptions of federal constitutional issues; irrelevant and illogical rulings upon place and time of trial 63-71

Conclusion 72

Appendix 73-76

TABLE OF CASES.

PAGES

Aldridge vs. United States 57n
American Railway Express Co. vs. Levee 62
Brown vs. State 67n
Carter vs. Texas 54, 60-62
Commonwealth vs. O'Keefe 49n
Cooke vs. United States 5, 34, 48, 49n, 59
Downer vs. Dunaway 44n, 69n, 70n
Estes vs. Commonwealth 45, 55, 66
Frank vs. Mangum 42n
Franklin vs. South Carolina 48n, 70
Hicks vs. State 46n
Jackson vs. Commonwealth 49
Kansas City Southern Ry. vs. Albers Com. Co. 71
Lee vs. State 61n
Martin vs. Texas 5, 35, 60, 61
Mitchell vs. Commonwealth 50
Moore vs. Dempsey 4, 27, 34, 36-47, 62, 65, 68, 69n, 71
Neal vs. Delaware 35, 40n, 60, 61, 70n
Norfolk & Western Ry. vs. West Virginia 71
Pennoyer vs. Neff 34, 48
People vs. Nitti 50
Rogers vs. Alabama 5, 60-62, 65n
Sanchez vs. State 50
Seams vs. State 66n
Sheppard vs. State 49, 58, 59
Story vs. State 16n
Thompson vs. State 22n, 69
Truax vs. Corrigan 62
Tumey vs. Ohio 5
Virginia vs. Rives 60
Wood, in re 60, 62

CONSTITUTIONAL PROVISIONS AND STATUTES.

PAGES

United States Constitution, 14th Amendment, Section 1 ..... 3, 4, 34n, 72

United States Judicial Code, Section 237-b 2

Alabama Code

Sec. 3258 ..... 34, 73
" 5202 ..... 54n, 73
" 5203 ..... 54n, 73
" 5407 ..... 15, 32, 74
" 5567 ..... 10, 74
" 5570 ..... 12n, 74
" 5579 ..... 55, 74
" 5580 ..... 22, 75
" 6088 ..... 3, 75
" 8630 ..... 9n, 76

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BRIEF FOR PETITIONERS.

I.

Opinions of the court below.

The cases come to this Court pursuant to certiorari granted May 31, 1932 (Po., 187; Pa., 195; W., 179).

The opinion below in the Powell case is reported in 224 Alabama, 540; in the Patterson case in 224 Alabama,

531; in the Weems case in 224 Alabama, 524. The opinions appear in these records at Po., 145; Pa., 167; W., 152.

The chief opinion—the only opinion that expressly alludes to the whole set of records—is in the Powell case (see Po., 170; see also W., 163).

The majority of the Alabama Supreme Court in all the cases affirmed the convictions. Anderson, C. J., in all the cases dissented,—with opinion in the Powell case (Po., 171).

II.

Jurisdiction.

1.

The statutory provision sustaining the jurisdiction is Judicial Code, §237-b, as amended by Act of February 13, 1925, 43 Stat., 937.

2.

The date of the judgment to be reviewed is in all the cases March 24, 1932, when the opinions of affirmance below were handed down (Po., 145; Pa., 167; W., 151).

Petitions for rehearing were made in all the cases and on April 9, 1932, were denied (Po., 179; Pa., 188; W., 171).*

3.

The nature of the cases and the rulings below were such as to bring the cases within the jurisdictional provision of §237-b,—as appears from the following:

---

*The Alabama Supreme Court in all the cases fixed May 13, 1932, as the date of execution (Po., 144; Pa., 106; W., 151). It subsequently granted a stay pending certiorari proceedings here (Po., 184; Pa., 192; W., 175) and a further stay after certiorari had been allowed.

(a)

The Alabama Code (§6088)* authorizes the defendant in a criminal case to include in his bill of exceptions to the appellate court the ruling of the trial court denying a motion for new trial, and requires the appellate court to consider grounds of error specified in the motion.

The defendants in all the cases moved for new trial (as appears in detail under "(b)" below) and included as grounds, that the trials and convictions constituted denials of due process and equal protection in the respects here urged.

The defendants in all the cases "separately and severally" filed "a true and correct bill of exceptions," as the trial judge certified, and did this "within the time prescribed by law" (Po., 137; Pa., 161; W., 144; see also Certificates of Appeal, *ibid.*). The judge in all the cases "accordingly signed" the bills of exceptions and "allowed them of record as such" (*ibid.*).

The defendants in all the cases, upon appeal to the Alabama Supreme Court, included the motions for new trial in the bills of exceptions (Po., 53, *et seq.;* Pa., 53, *et seq.;* W., 64, *et seq.*).

(b)

The specific statements of federal constitutional rights in the motions for new trial appear at Po., 109-113 (see also pp. 55-6, 83-4, 85-6); Pa., 102-8 (see also pp. 57-60, 114-5, 116-7); W., 106-110 (see also pp. 66-8, 80-2, 83, 84).

The claims are:

That the denial of "a fair and impartial trial before an unbiased and unprejudiced jury" constituted a viola-

*The Code sections appear in the Appendix in their numerical order in the 1928 compilation. The Appendix is bound with this brief.

tion of rights under the Fourteenth Amendment (Po., 111; Pa., 104; W., 108); that the refusal of a change of venue was "a denial to the defendants of their rights under the Constitution of the United States, Amendment Fourteen, Section 1" (Po., 110; Pa., 104; W., 108); that the demonstration and excitement attending upon the trial constituted a denial of due process (Po., 83-4; Pa., 114-5; W., 80-1); that the overawing of the jury constituted a denial of due process (Po., 85; Pa., 116-7; W., 83); "that the defendants were compelled to go to trial represented by attorneys, who by their own admission in open court, stated that they were not prepared," and that this was a denial of due process (Po., 83; Pa., 114; W., 80); that "this is especially true because in fact the defendants were neither represented by counsel retained by them or anyone on their behalf authorized to make such retainer" (Po., 83; Pa., 114; W., 80; see also for an elaborate statement, Po., 110-1; Pa., 104-5; W., 108-9); that the trial of the defendants before juries from which qualified negroes were, "by reason of a custom of long standing" (Po., 84; Pa., 115; W., 82), excluded was a violation of the Fourteenth Amendment (Po., 113; Pa., 108; W., 110).

(c)

The Alabama Supreme Court considered in terms whether "any right guaranteed to the defendants under the Constitution of the United States" had been "denied to the defendants in this case." It said that "the record shows that every such right of the defendants was duly observed and accorded them" (Po., 163-4).*

*See also the reference to the Fourteenth Amendment at Po., 162.

4.

The following cases in this Court, among others, sustain the jurisdiction:

Moore vs. *Dempsey* (261 U. S., 86) establishes as an element of due process the right to an orderly and deliberate trial; *Cooke* vs. *United States* (267 U. S., 517) establishes as an element of due process an effective right to counsel; *Rogers* vs. *Alabama* (192 U. S., 226) condemns as a violation of the equal protection clause the trial of a defendant before a jury from which qualified members of his race are systematically excluded; *Tumey* vs. *Ohio* (273 U. S., 510) and *Martin* vs. *Texas* (200 U. S., 316, 319) illustrate that where the record in the state court raises such issues, this Court has jurisdiction to review the decision below upon direct attack.

III.

Statement of the cases.

The constitutional issues are presented upon undisputed facts. They are presented upon the records of the trial court, including the motions for new trial and the affidavits in support. Upon these issues the prosecution in its affidavits in opposition made no attempt at contradiction.*

In a single instance there is a shade of disagreement relevant to the constitutional issues between the affidavits upon the motions for new trial and the testimony of a witness heard upon the motions. We there take those minimum facts about which there is no dispute.

Course of events.

As a preliminary to the consideration of particular matters—newspaper publications, the rôle of the military, public demonstrations—bearing upon the issues of mob domination during trial, the denial of counsel, race discrimination, we first state the course of events in chronological outline.

On March 25, 1931, in the afternoon, there were on a freight train going south from Chattanooga into Alabama 7 white boys; the 9 negro boys who were subsequently brought to trial,—namely Patterson, the two Wrights and Williams, who were his associates and fol-

*Alabama recognizes the rule that uncontradicted statements in affidavits for a new trial are to be accepted as true (Po., 168). The Alabama Court reversed the conviction of a boy Eugene Williams, who was tried along with the other defendants in the Powell case, upon the showing in the new-trial affidavits that he was under 16 and therefore subject to prosecution only in the juvenile court (Po., 168-9).

lowers (Pa., 37, 39, 42, 44), and the 5 others;* a number of other negro boys,—according to all accounts at least 3 more, according to some still more (Po., 27, 36, 38, 41; Pa., 41, 47; W., 29, 50, 51, 54). Both the white and the black boys were in a "gondola," or open, car (Po., 22, 26, 33, 38, 41). There were also on the train two white young women, Mrs. Victoria Price and Miss Ruby Bates. According to their testimony they too were in the gondola car (Po., 22, 26).

The negro boys and the white boys began fighting, and the white boys, with the exception of one named Gilley, were thrown off the train. A message was sent by "wire" "to get every negro off of the train" (Po., 46). The message said nothing about any molestation of the girls but did report the fight between the two sets of boys (Pa., 33; W., 40).**

At the way-station of Paint Rock, southwest of Scottsboro, a sheriff's posse met the train "and got the bunch that was on the train" (Po., 46).*** Certainly on that day and apparently by that time, and before any reference to the girls had come into the matter, special deputy sheriffs were appointed (Po., 46).

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*The Alabama Supreme Court, as just stated, reversed the conviction of the Williams boy because he was under 16; Roy Wright, who was 14 (Pa., 39), was not brought to trial with the others and was not convicted (see Pa., 173). The original 9 defendants have thus been reduced to 7 petitioners in this Court.

**The message was apparently a telegram (Po., 46, but see Pa., 33). It was not produced at the trial but there was no dispute as to its contents.

***That is, the posse seized all that were still on the train. Mrs. Price and Miss Bates testified all through the trials that they were raped by all the 9 negroes apprehended and by 3 others,—6 boys assailing each. The other 3 were not apprehended or brought to trial. According to other witnesses there were 14 or more negroes on the train during the fight between the two sets of boys (Po., 27, 36, 38, 41; Pa., 41, 47; W., 29, 50, 54).

At Paint Rock the notion got abroad that some injury had been done to the girls. The girls and the prisoners were taken at once to Scottsboro, the county seat. Mrs. Price and Miss Bates were examined by physicians,—upon their own statements within two hours, or perhaps with an hour, of the "occurrence" (Po., 23-4; W., 32).

At Scottsboro the excitement became intense. According to the next day's local newspaper a "great crowd," a "threatening crowd," gathered (Po., 8; Pa., 7; W., 7); the "Mayor and other local leaders plead for peace and to let the law take its course" (Po., 8; Pa., 7; W., 7). According to another contemporaneous newspaper account it was due to the Sheriff and his band of deputies that the crowd did not enter the jail and seize the negroes (Po., 17; Pa., 16; W., 17).

The Sheriff on the same day requested the Governor to call out the National Guard (Po., 8; Pa., 7; W., 7). At 9 o'clock in the evening the Adjutant-General, acting by the Governor's order, telephoned from Montgomery to Major Starnes at Guntersville to take hold of the situation with his men (Po., 96; Pa., 87; W., 94). Major Starnes with other officers and 3 companies arrived at Scottsboro within 3 hours after the call (Po., 8; Pa., 7; W., 7).

Thereafter the prisoners were continuously under Major Starnes' guard. For their protection he employed "picked men" (Po., 96; Pa., 87; W., 94).

On March 26, the day after the supposed crime, Circuit Judge Hawkins summoned the Grand Jury to reconvene and called a special session of the Circuit Court (Po.,

139-41; Pa., 162-4; W., 147-9). All subsequent proceedings were by special Grand Jury,* a special venire of the petit jury and at a special session of the Circuit Court (see *e. g.*, Po., 1, 21).

On March 31 all defendants were indicted (Po., 1; Pa., 1; W., 1). They were all subsequently brought to trial only for an alleged rape on Victoria Price effected in concert. Four indictments were, however, at this time placed against each defendant: this collective indictment in the Price case; a similar collective indictment in the Bates case, and two individual indictments in the cases respectively of Mrs. Price and Miss Bates (for a summary of this day's proceedings see Po., 10-14; Pa., 9-13; W., 9-13).

There was a form of arraignment on March 31 (Po., 141; Pa., 164; W., 149; for allusion thereto in the opinions below, see Po., 149; Pa., 170; W., 152). But, as we shall see, the defendants were definitively arraigned only on April 6, the day trial commenced (*infra*, p. 12).

"For the purpose of arraigning the defendants" Judge Hawkins purported to appoint all the members of the Scottsboro bar (Po., 88; Pa., 79; W., 86).** He "antici-

*No objection "can be taken to the formation of a special grand jury summoned by the direction of the court" (Alabama Code, §8630, Appendix).

**The minutes of March 31 show the arraignment of that date but contain no reference to an appointment of counsel, though there is a recital of appearance "represented by counsel" (Po., 141; Pa., 164; W., 149). That definitely the defendants never *employed* any counsel until after the trials were over and that the only proceedings that even in the view of the majority of the Court below constituted an *appointment* of counsel occurred on April 6, see *infra*, pages 10-11, 18, 50-53.

pated them to continue to help them if no counsel appears" (Po., 88; Pa., 79; W., 86).

The appointment was invalid under the Alabama law, which permits the designation of "not exceeding two" (Alabama Code, §5567, quoted in Appendix). Indeed, it is said in affidavits, and not contradicted, that the Judge "released" all these lawyers from this appointment (Po., 83; Pa., 114-5; W., 81). And it is shown by the record that one of the lawyers—a member, according to the Chief Justice, of "one of the leading, if not the leading, firm" (Po., 172)—thereafter joined the prosecution as special counsel and actively participated at all the trials in behalf of the prosecution.*

On March 31 the Court set April 6 as the date of trial for all the cases (Po., 141-2; Pa., 164; W., 149). The same day a writ of arrest issued (Po., 2; Pa., 1-2; W., 2). The Court directed the Sheriff to serve the jurors for trial on the 6th and to make a return showing the service. On Saturday, April 4, the Sheriff made his return (Po., 142; Pa., 165; W., 150).

Monday, April 6, was, as just stated, the day set for the trial of all the cases. None of the defendants had up to that time employed counsel or had had any opportunity to employ counsel. Nor had the parents of any of them (Po., 80, 83, 76; Pa., 111-2, 114-5, 98; W., 78, 80-1, 73).

The only way fully to get the flavor of the proceedings—crucially important—in relation to the appointment of counsel on April 6, is to read them through; they appear in identical language at Po., 87-92; Pa., 78-82; W., 85-9:

*For Mr. Proctor's statement that he felt free to do this and the trial Court's acquiescence, see Po., 91; Pa., 81-2; W., 88-9.

There had evidently been some notion that a Mr. Roddy of Chattanooga might appear for the boys.* The Court did not wish to "impose" upon local counsel. Mr. Roddy, however, declared, "I don't appear as counsel," but "I would like to appear along with counsel that your Honor has indicated you would appoint." A member of the local bar, Mr. Moody, spoke up and said, "Of course if your Honor purposes to appoint us,** I am willing to go on with it." Mr. Roddy explained, "They have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of people who are interested." "I think the boys would be better off if I step entirely out of the case." Mr. Roddy therefore said,—"I would like for your Honor to go ahead and appoint counsel."

The Court, however, still hesitated, saying, "If Mr. Roddy will appear, I wouldn't of course, I would not appoint anybody." Mr. Roddy declared, "If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent." Mr. Moody said, "I am willing to go ahead and help Mr. Roddy in anything I can do about it, under the circumstances." The Court ruled, "All right, all the lawyers that will."

Mr. Roddy handed up a half-page petition for a change of venue with exhibits setting forth articles in the Jackson County Sentinel published in Scottsboro, and in a Chattanooga and a Montgomery paper (Po., 92, 4-17; Pa., 82, 3-17; W., 89, 4-18). The Court took testimony

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*See Po., 11-12; Pa., 10-11; W., 11.

**Both Mr. Moody and the Court, even on April 6, seem to have had the notion that a general appointment of the whole body of members of the local bar might be valid. Compare the Court's references to "imposing on you *all*" (Po., 89; Pa., 79; W., 86) and to "*all* the lawyers" (Po., 91; Pa., 81; W., 88).

from two persons, both of whom happened to be present in the court room,—Sheriff Wann and Major Starnes (Po., 18-21; Pa., 17-20; W., 18-21; for the same testimony set forth more fully in question and answer form, see Po., 93-8; Pa., 83-9; W., 90-5,—exhibits on motion for new trial). Judge Hawkins inquired whether there was "anything else for the defendants" (Po., 98; Pa., 89; W., 96), and Mr. Roddy said, "No." The Court decided: "Well, the motion is overruled, gentlemen" (Po., 98; Pa., 89; W., 96). The defendants excepted (Po., 21, 98; Pa., 20, 89; W., 22, 96).

The prosecutor asked the defense whether it "demanded" a severance.* Mr. Roddy said, "No" (Po., 99; Pa., 89; W., 96).

The Court then inquired of the prosecutor whether his side wished a severance, and the prosecutor asked for one and in the Court's discretion obtained it (W., 96-7).**

In the subsequent trials the defense again demanded no severances (Pa., 20-1; Po., 21-2). But the prosecution obtained a severance of the case of Patterson, the leader (W., 53, 55; Pa., 42), from the others (Pa., 20).

There was, as we have said, some sort of arraignment on March 31. But each defendant was separately and "duly arraigned" at the beginning of his trial,—on April 6, 7 and 8 (W., 99, 3; Pa., 92, 2; Po., 101, 3).

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*The Alabama Code (§5570) provides that "when two or more defendants are jointly indicted, they must be tried either jointly or separately, as either may elect." Practice Rule 31 is concerned with the mechanics of making the right good (both appear in the Appendix).

**The prosecutor elected to try in the first case two of the older boys, Norris and Weems. His first desire was to try Roy Wright with them. This boy had apparently given a statement implicating the other defendants (Po., 7; Pa., 6; W., 6; *infra*, pp. 14, 57-8). But he was 14 years old, and his youth was apparent. The Court, in order to avoid a delay while the boy's age was being definitely established, suggested that he be tried later. And he was not in fact tried with any of these defendants (Po., 99; Pa., 89-90; W., 96-7).

There was no motion for a continuance in any of the cases. The trial of Weems and Norris was commenced on April 6 and concluded on the 7th (W., 3; Pa., 2, 27); the trial of Patterson was commenced on the 7th and concluded on the 8th (Pa., 2, 41; Po., 2-4); the trial of Powell and his four co-defendants was commenced and concluded on the 8th (Po., 2-4).

The juries were composed exclusively of members of the white race. Although "a large number of negro land-owners were qualified jurors" "there was not one negro selected for the entire trial." The exclusion was "by reason of a custom of long standing" (Po., 84, not denied; Pa., 115, not denied; W., 82, not denied).

The record does not show what interrogation, if any, was given to the jurors before they were accepted for service. It does, however, show that the jurors were not, as a regular thing certainly, asked whether they entertained a prejudice against negroes. This fact is flatly charged both in the petition for new trial (Po., 112-3; Pa., 107-8; W., 110) and in the affidavits in support (Po., 86; Pa., 117; W., 83). It is undenied in the answering affidavits. Upon a hearing held in open court on the new-trial motion, at which those jurors who participated in the third case were called as witnesses, the prosecution repeatedly and successfully objected to the question whether they were interrogated about race prejudice (Po., 123-4, 125, 126, *et seq.;* Pa., 147, 148, 150, *et seq.;* W., 119, 120, 122, *et seq.*).*

*It could have been said without qualification that *no* juror was interrogated upon this subject had not the juror Elkins intimated a contrary recollection (Po., 119; Pa., 142; W., 114). He added, however, that he "couldn't say positively who asked that question," and "I don't remember just what the question was about."

The only witnesses the defense called in any of the cases were negroes under indictment for the crime charged. In the two cases first tried witnesses called by the defense gave testimony which undermined the cause of a co-defendant or of the sole defendant. Norris testified in the Weems case that there had been raping by negro boys other than himself (W., 56);* young Roy Wright gave like testimony in the Patterson case (Pa., 39-41).

The records show no opening address for any defendant and no closing address. In two cases the records show affirmatively that the defense, in the presence of the jury, elected not to sum up to the jury (Po., 48; W., 59). In the first case "defendants' counsel stated to the court that they did not care to argue the case to the jury, but counsel for the State stated to the court that they did wish to argue the case to the jury." "At the conclusion of said argument of counsel for the State to the jury counsel for defendants stated that they still did not wish to argue the case to the jury," but the Court "permitted counsel for the State to further argue the case to the jury."**

The Court's charges in the three cases were stereotyped and virtually identical (W., 60-3; Pa., 50-3; Po., 48-53). He told the first jury: "Let me have your attention for a few moments and then you will have this case" (W., 60). So too he asked the second jury to

*He subsequently recanted this testimony (W., 130-5).

**For the significance that the Alabama Chief Justice with his practical experience of litigation attaches to the circumstance that summing up was waived by the defense—and waived without a countervailing waiver from the prosecution—see Po., 173.

"let me have your attention for a few moments and we will finish the trial of this case" (Pa., 50).

In no case did counsel who purported to appear for the defendants take any exceptions to the charge or submit any charges of their own (W., 63; Pa., 53; Po., 53).

In all the cases and as to all the defendants the juries brought in verdicts of guilty. The punishment for rape may be anywhere from 10 years' imprisonment to death, "at the discretion of the jury" (Alabama Code, §5407, Appendix). Upon all the defendants the juries imposed the death penalty (Po., 3; Pa., 2; W., 3).

On April 9 all the defendants were sentenced. None of them said anything as a reason why sentence should not be imposed upon him,—not even the 14 year old boy Williams, nor Mr. Roddy or Mr. Moody in his behalf (Po., 3; Pa., 3; W., 3).* Execution was in all cases set for July 10 (Po., 3; Pa., 3; W., 3). But appeal was on April 9 taken to the Alabama Supreme Court, and the sentences were suspended pending its disposition (Po., 3; Pa., 3; W., 3). Mr. Roddy and Mr. Moody at this time filed a motion of two paragraphs to set aside the verdict and for new trial (Po., 53; Pa., 53-4; W., 63-4).

On April 18 the death warrants were written (Po., 3; Pa., 3; W., 3).

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*Mr. Roddy did subsequently make an affidavit confirming that Williams was under 16 (Po., 117).

In the course of the next few weeks the defendants' families retained for the boys General Chamlee of Chattanooga (Po., 75; Pa., 97; W., 73). On May 6 "by permission of the Court" the motion theretofore made for a new trial was amended by General Chamlee and a new motion with copious affidavits filed (Po., 53-80, 80-108; Pa., 54-102, 102-141; W., 64-77, 77-106); on June 5 the application for new trial was somewhat expanded and a second amended motion filed (Po., 108-17; Pa., 102-111;* W., 106-113). It was these amended motions for new trial that asserted—and the petitions and supporting affidavits that laid the factual foundations for—the claims of constitutional right.

The prosecution at various dates after June 5 submitted numerous affidavits in opposition (Po., 132-7; Pa., 155-60; W., 127-30; 135-144). The prosecution's affidavits were primarily concerned with the girls' characters,—specifically with the point whether or not they had, as charged in the moving affidavits (Pa., 63-77, 133-7; Po., 102-5; W., 99-103), committed acts of prostitution with negro men and had the reputation of having done so (Pa., 156-60; Po., 132-6; W., 127-30, 135-7).**

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*In the Patterson case the filing was on May 19 (Pa., 102).

**The Alabama rules on the subject are settled by *Story* vs. *State* (178 Ala., 98), and by the decisions below:

In the *Story* case the prosecution was of a negro for rape upon a white woman. There was a defense of consent. At the trial the general fact that the prosecutrix was a prostitute was "confessed" (178 Ala., at 101), but evidence was excluded that she had a specific reputation for unchaste conduct with negroes. The gist of the Alabama Supreme Court's decision in the *Story* case is: The infamy involved in a white woman's immorality with negroes is so great that no matter how clearly the general fact of prostitution be established, it will not be deduced that she might have been guilty of immoral conduct with negroes; the defense therefore had a right to show that the particular white woman had the reputation of misconducting herself with negroes; for the exclusion of the evidence the conviction was reversed.

In the cases at bar the Alabama Supreme Court ruled that because the negroes denied all intercourse with the white women there was no issue of consent on the part of the women and the whole question of

(*Footnote continued on next page.*)

The prosecution left unchallenged those allegations in the moving affidavits on which were rested the contentions that fair trial had been withheld, the right to counsel denied, and race discrimination practiced in violation of the Constitution of the United States.

On June 22 "the final hearing of said motion for new trial as last amended" was had (Po., 136; Pa., 160; W., 143). On the same day the motion was in all the cases denied (Po., 137; Pa., 161; W., 144). Appeal was taken from the denial (Certificate of Appeal, Po., 137-8; Pa., 161-2; W., 144-5).

We have stated in general outline the course of proceedings. It is in the light of accompanying facts—the quality and circumstances of the defendants; the atmosphere of the place at the time as reflected in the press, in the crowds, in the display of military force; the influence of these things upon the juries—that the questions arise whether in the constitutional sense the trial was fair, the right to counsel effective, and justice free from discrimination by reason of race.

The circumstances of defendants' confinement.

The defendants were all ignorant, all but one illiterate (Po., 5, 84; Pa., 4, 115; W., 4, 81). All were of "immature years" (Po., 84; Pa., 115, 99; W., 81). Just how immature we do not in all cases know. Of Patterson, the

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(Footnote continued from preceding page.)

their having a reputation for unchastity with negroes was immaterial (Po., 163; Pa., 179; W., 163). The Court approved too the ruling of the trial court sustaining the prosecution's objection to the question put to Victoria Price on cross-examination,—"Did you ever practice prostitution?" (Pa., 171, 26).

leader, we know only that he was "under 21 years of age" (Pa., 99). Of those whose ages we have the oldest was 19 (Pa., 42, 43).

None of the defendants lived in Scottsboro or in Jackson County or in Alabama: Patterson and Wright had their homes in Chattanooga (Pa., 36; Po., 37); Roberson in Memphis (Po., 36); Weems, Norris and Powell in Atlanta (W., 52, 55; Po., 33); Montgomery in Monroe, Ga. (Po., 39).

All the defendants were continuously in confinement under military guard from the evening of March 25 to and through the trials,—for a day in Scottsboro, generally in Gadsden (Po., 80; Pa., 111-2; W., 78).

The defendants thus describe their condition on the day trial started: They "had no opportunity to employ counsel and no money with which to pay them and had no chance to confer with their parents, kinsfolks or friends and had no chance to procure witnesses and no opportunity to make bond or to communicate with friends on the outside of the jail" (Po., 80; Pa., 112; W., 78). There is no contradiction or qualification.* And the father of the Patterson boy, the mother of the Williams boy and the mother of the two Wright boys unite in the declaration that—even to see their sons, awaiting trial or undergoing the ordeal of trial—they were "afraid to go to Scottsboro," "afraid" even "to go to Gadsden" (Pa., 99, 100, 102; Po., 77, 78, 79; W., 74-5, 76, 77).

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*The prosecution had peculiar opportunity to contradict allegations concerning the circumstances of the prisoners' confinement, and did in numerous affidavits purport to contradict allegations concerning the alleged maltreatment of a particular prisoner (see the succession of affidavits appearing in W., 137-43).

Sentiment of community and atmosphere of trials.

The charge was the "most serious charge known on the statute books of Alabama, rape" (Jackson County Sentinel, April 2, Po., 10; Pa., 9; W., 9-10). The charge was of rape perpetrated upon white girls by blacks. It was of rape so perpetrated 12 times. "This crime stands without parallel in crime history" (Jackson County Sentinel, *ibid.*, Po. 8; Pa., 8; W., 8).

"The character of the crime was such as to arouse the indignation of the people, not only in Jackson and the adjoining counties, but everywhere, where womanhood is revered, and the sanctity of their persons is respected" (Powell Opinion, Po., 156).

The press. Publications in the Jackson County Sentinel, begining on March 26, the day after the occurrence, and including an editorial on April 3, the Friday before the Monday on which the trials commenced, reflect—and could not have failed to intensify—local feeling (W., 5-18; Po., 5-17; Pa., 5-17). This Court, we are sure, will read the articles and there is no need of extended quotation. But consider the implications of this sentence in the first article—under a 7-headline spread—, a sentence that immediately follows the "crime without parallel" reference:

> "Calm thinking citizens last night realized that *while* this was the most atrocious crime charged in our county, that the evidence against the negroes was so conclusive as to be almost perfect and that the ends of justice could be best served by a legal process" (Po., 8-9; Pa., 8; W., 8; our italics).

"Sensational and damaging" is the characterization the Alabama Supreme Court in its principal opinion accepted for these articles appearing in the County newspaper (Po., 153).

Crowds. "Such a happening," as the Court below remarks (Po., 154), "made the basis of the charge against the defendants, was calculated to draw to Scottsboro, on the occasion of the trial, large crowds. It would be surprising if it did not." Sheriff Wann, testifying on April 6, was put the following question and gave the following answer concerning conditions on that day,—the day the trials commenced:

> "Q. And there is a great throng around this court house right now that would come in if you did not have the troops?
>
> A. Yes, sir; they are from different counties here today" (Po., 95; Pa., 85; W., 92).*

Numbers are notoriously difficult to estimate. The only clear facts as to the *size* of the crowds at the trials are the following:

Scottsboro has a population of about 2,500.** The statement in the motions for new trial that a crowd of 10,000 was gathered in Scottsboro at the trials (Po., 111; Pa., 105; W., 109) is not contradicted in the opposing affidavits. Mr. Venson, a demonstrator of Ford cars, called as a witness for the prosecution in opposition to the new-trial motions, did not, indeed, "think there were 10,000." He "wouldn't guess there was 5,000 people at any one time on the street; I don't think so, but I don't know." But he agreed that "there was a big crowd," "a crowd in town all day," "a crowd around the court house" (Po., 131, Pa., 154-5; W., 126).

Certain it is that the Ford Motor Company found it worth while on Monday, the 6th, to order Mr. Venson

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*The Sentinel on March 26 applied the same adjective, *"great,"* to "the crowd gathered at the jail" on March 25 (Po., 8; Pa., 7; W., 7). For the trial it predicted a *"tremendous* crowd" (Po., 15; Pa., 14; W., 16).

**2304 in 1930 (15th Census, Vol. I, p. 85).

to bring on, for Tuesday, a demonstration of "about 28 trucks,"—"a Ford caravan of commercial trucks" (Po., 130-1; Pa., 154; W., 126).

The *temper* of the crowds is revealed:

On March 25—the day of the alleged occurrence and of the arrest—"the Mayor and public officials had to make speeches to try to persuade the mob to adjourn" (Po., 84; Pa., 115; W., 81). There is no denial from the Mayor or from any public official or from anyone. There is on the contrary overwhelming contemporaneous confirmation. The Sentinel of March 26 tells us not only that the crowd "gathered at the jail" on March 25 was a "great crowd" but in so many words that it was a "threatening crowd" (Po., 8; Pa., 7; W., 7). The Montgomery Advertiser, also writing of the events of March 25, declared in an editorial that but for the Sheriff's prompt action "those 300 Jackson County citizens might have opened the jail at Scottsboro, and seized the nine or twelve negroes who were charged with criminal assault upon two white girls" (Po., 17; Pa., 16; W., 17).

The feeling of the crowds was no different when trial commenced. On April 6 the "great throng," we have the Sheriff's word for it, would—but for the troops—have come into "this court house right now" (*supra*, p. 20).

The responsible officials showed by their actions the estimate that at the time they put upon the public's temper:

The Mayor of the town "plead for peace." The Sheriff of the County called upon the Governor to order out the Guard. The Judge of the Circuit instructed the commanding officer to search for arms citizens coming into the court room or even into the court house grounds (Starnes, Po., 96-7; Pa., 128; W., 94).

The military. "Every step that was taken from the arrest and arraignment to the sentence was accompanied by the military," says the Chief Justice,—and he finds the circumstance profoundly significant (Po., 172). The State's legislation certifies that he is right:

> "The trial judge may, with the consent of the defendant, ex mero motu, direct and order a change of venue as is authorized in the preceding section, whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence" (Alabama Code, §5580; Appendix).*

The record shows the following concerning the "danger of mob violence" and the need of "protecting the defendants":

The Sheriff's regular force was insufficient to safeguard the prisoners. The Special Deputy Sheriffs —who explained in an affidavit submitted by the prosecution that their function was "to protect the prisoners from annoyance and harm of any kind" (W., 142)— were insufficient. Sheriff Wann—on the day the trials commenced—was asked and answered as follows:

> "Q. You deemed it necessary not only to have the protection of the Sheriff's force but the National Guard?
>
> A. Yes, sir" (Po., 94; Pa., 125; W., 91).

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*See also the strong declaration of the significance of the military's being called out in a rape case in *Thompson* vs. *State*, 117 Ala., 67, quoted *infra*, pp. 68-9.

Major Starnes—also on the day the trials commenced—was asked whether his "units of the National Guard have protected" the defendants, and "have been with them on every appearance they have made in this court house",—and answered, "That is correct." "Every time it has been necessary" (Po., 97; Pa., 128; W., 94).

The record shows the size and equipment of the military force. "A picked group of twenty-five enlisted men and two officers from two of my companies" was employed to bring the defendants over for arraignment, Major Starnes tells us (Po., 96; Pa., 127; W., 94). On the day the trials commenced this officer had with him about 10 other officers and over 100 enlisted men. There were "five units represented" (Starnes, Po., 96; Pa., 127; W., 93).

The Guard had their rifles of course. But they did not rely upon their rifles alone. "I think there were eight machine guns around here" on the day the trials were concluded, says a juror who served that day. "There were some boxes of tear bombs sitting around" (Po., 121; Pa., 144; W., 116).

Demonstrations. The Guard did successfully prevent overt acts of violence against the prisoners. It could not prevent demonstrations of public feeling. The verdict in the Weems case determined the result as to two defendants. It foreshadowed the results as to Patterson, on trial that day, and as to the five defendants to be tried the next day. Upon the report of the jury imposing the death penalty "there was a demonstration in the court house by citizens clapping their hands and hollowing and shouting." "Soon thereafter a demonstration broke out on the streets of Scottsboro" (Po., 81; Pa., 112; W., 79).

The foregoing statements are not contradicted. They are on the contrary confirmed by the testimony of persons who were waiting to be called as jurors in the third

trial and who were called as jurors (Po., 118, 120, 124, 125, *et seq.;* see *infra,* p. 27). These statements are further confirmed by the testimony of Major Starnes: "There was considerable demonstration in the court room when the jury rendered their verdict, by yelling and clapping of hands in the court room here" (Pa., 140).*

The only point bearing upon the issues here at which there is a shade of disagreement over the facts, concerns the part played by a band when the Weems verdict came in. We rest our argumentation, as we have already said, upon facts undisputed and therefore, where there is any element of uncertainty, upon minimum facts. We summarize however the different statements in order to determine what the minimum facts are:

The defense in its affidavits for a new trial set forth in detail that at the time the Weems jury reported, the Hosiery Mill band paraded and played such tunes as "Hail, Hail, the Gang's All Here" and "There Will Be a Hot Time in the Old Town Tonight" (Pa., 113; Po., 82; W., 80). The prosecution's affidavits did not contradict or qualify this statement. At the hearing in open court upon the new-trial motion the prosecution produced no witness from the band. It did produce Mr. Venson, the demonstrator of Ford cars. He testified that while there was noise on this occasion, it was caused by his use of a graphophone with an amplifier. The Hosiery Mill band did play, he said, but it was later in the afternoon,—at six o'clock when the National Guard had its guard mount (Pa., 154-5; Po., 130-2; W., 125-7).

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*Captain Fricke, an aide of Major Starnes, in immediate charge in the court room, testifies in express accord to "the applause in the court room" (Pa., 141).

The Alabama Supreme Court noted that the charge of demonstration in the court room was confirmed but adopted a rule of practice which precludes the proving of such matters by "evidence *aliunde*" (Pa., 177-8).

The minimum facts thus are: When the verdict came in there was music in the streets; the sound was amplified; the Hosiery Mill band performed the same afternoon; the tunes played were tunes like the tunes named or the very tunes.

Atmosphere is elusive,—difficult after the event to recapture. We have tried to classify the direct evidence. It remains to note the significance of certain circumstances or events that we have not been able to group under particular captions.

The defendants were boys on trial for their lives. The press was full of the danger of their position. Yet no member of their families visited them in Scottsboro or even in Gadsden, 40 miles off. "Colored people," they were "afraid to go to Scottsboro," "afraid to go to Gadsden."*

Major Starnes had, on April 6, a force in Scottsboro with machine guns and tear gas bombs. He had a "picked group" for the immediate protection of the prisoners. With all these precautions it was thought wise to carry the prisoners from Gadsden in the quietest hours of the night,—they "arrived here at 5:15 this morning" (Starnes, April 6, Po., 97; Pa., 88; W., 95).

Unofficial and even official expression asserted or—even more significant—*assumed* guilt. It was because, as early as March 25—the very day of the occurrence—the evidence was accepted as "so conclusive as to be almost perfect," that "calm thinking citizens" came to the conclusion "that the ends of justice could be best served by a legal process" (*supra*, p. 19).**

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*The affiants requested that even the motion for new trial be heard elsewhere than in Scottsboro (Po., 79-80; Pa., 102; W., 77).

**For a like statement in the Sentinel of April 2, see Po., 11; Pa., 10; W., 10-11.

Major Starnes had it as his duty to protect the prisoners and did so. But even this official on the morning of April 6—before one item of evidence had been presented—referred, in testimony publicly given, to "the attack" as having "occurred" (Po., 96; Pa., 87; W., 94).

Community sentiment shared by juries and reflected in verdicts.

Jackson County is a rural community of about 35,000 inhabitants.* A jury drawn from a community so small and so closely knit must reflect community feeling. The juries did:

Of necessity the Jackson County jurors had their attention called to the articles in the Jackson County Sentinel. All the 100 had their names printed on April 2 in the article that explained that the negroes had been "indicted on the most serious charges known on the statute books",—an article that explained too that "the matter will" (unless it "becomes necessary to try each defendant separately") "be made brief" (Po., 12-14; Pa., 11-13; W., 11-13). The only juror that anyone, upon the hearing of the motion for new trial, bothered to ask whether he read the newspapers said he had. He "read the Scottsboro papers about the attack on these girls." He believed, too, that he "read the Chattanooga papers. I think those papers said these men, or some of them, had confessed their guilt" (Po., 119; Pa., 142; W., 114).**

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*15th Census, Vol. I, page 76.

**For references in the newspapers to some negro boys implicating others, see Po., 7, 17; Pa., 6, 16; W., 6, 18.

No safeguards were thrown around the jurors during the trials, and they continued to read the newspapers (Po., 85; Pa., 116; W., 83).

* * * * * *

All the jurors were summoned for April 6. Most or all must have been there when Major Starnes in advance of the production of evidence referred to "the attack" as an established fact.

We have noted the applause that greeted the rendition of the verdict in the first case. That applause was heard by the jury then trying the second case. Captain Fricke, who was in immediate charge in the court room, testifies that when the Weems verdict came in and "the applause in the court room" broke out, the jury in the Patterson case was in the jury room; that the jury room was about 30 feet away (Pa., 141); that the transom was partly open (Pa., 141).

The defense requested that the members of the second jury be produced at the hearing of the motion for new trial. Through some misunderstanding it was the members of the third jury that were in fact produced. That jury was not as a body present at the rendition of the first verdict. But one juror remembers "hollering" (Po., 120; Pa., 143; W., 116); a second, "whoopee" (Po., 118; Pa., 142; W., 114); a third, "a lot of noise, hollering and shouts" (Po., 125; Pa., 149; W., 121). A fourth tells us flatly:

> "It was generally understood by everybody" that the bringing in of the verdict "was the reason for the demonstration" (Po., 127; Pa., 150; W., 122).

The question here is not of "the petitioners' innocence or guilt." It is "solely the question whether their constitutional rights have been preserved" (*Moore* vs. *Dempsey*, 261 U. S., 87-8). The consideration that the results reached in trials wholly unprepared and essentially undefended were—as tested even by their own records—wrong results, is not as such material. But if "jury and judge" (261 U. S., at 91) are to proceed in the constitutional sense fairly, they must proceed calmly, deliberately,—with discrimination. And the Alabama Chief Justice finding—with his experience of years at the bar of the State, of nearly 40 years on the bench of the State—that the juries' actions revealed "no dis-

crimination," correctly deduced that the trials were not in the constitutional sense "fair and impartial" (Po., 173, 174).

The juries did not exercise deliberation,—and the internal evidence shows it:

(1) The physicians that examined the girls were scientific men. The prosecution called them. The doctors made their examination within an hour, according to Mrs. Price's first estimate (W., 32)—within an hour and a half or two hours according to her later estimate (Po., 24)—of the "occurrence" (W., 32). The girls were not "hysterical over it at all" (Dr. Bridges, Pa., 31; Dr. Lynch, W., 38). They were not "nervous" (Pa., 31).

(2) Six persons, according to the prosecution, had intercourse with each girl. With respect to Ruby Bates the doctors found only the deposit normal to a single act of intercourse (W., 33, 34, 37-8; Pa., 31; Po., 29).* With respect to Victoria Price they found much less (W., 37-8; Pa., 31; Po., 29).

(3) "I fought back at them" (Price, W., 30). "They hit me on the head" with a gun (Price, W., 27). The doctors found no head wound, no lacerations anywhere, no evidence of bleeding (W., 36, 37, 38).

(4) "Everyone of the negroes had pocket knives" (Price, W., 27). "They had their knives and pistols on them when they stopped the train at Paint Rock" (W., 47). Both girls were able to testify even to the calibre of the pistols (W., 23; Pa., 29; Po., 24). The boys were searched of course (see *e. g.*, W., 58). Two pocket knives were introduced in evidence (W., 58-9; Pa., 43-4; Po., 42-3). No pistols.

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*Miss Bates expressly testified that she was not a virgin and that she had had sex relations outside of those she charged against the defendants (W., 43; see also Dr. Bridges at Po., 30).

(5) Mrs. Price's undergarments "were torn off," "pulled apart" (W., 29, 23). She had these garments with her after the occurrence (Po., 23; Pa., 22; W., 23). She was kept in continuous confinement for the express purpose of being a "witness in these cases" (Po., 43). The garments were not produced.*

(6) Seven white boys were in the gondola car. Self-evidently they had a story to tell:

"We had spoken a few words with the white boys," Mrs. Price herself says (W., 28), though she explains that "that wasn't in no loving conversation" (W., 28). The colored boys "shot five times over the gondola where the [white] boys were" (Po., 26). "While the defendant Montgomery was having intercourse with me and the other one held me," the colored boys told the white boys that "they would kill them, that it was their car and we were their women from then on" (Po., 23). Thurman, a white boy, was hit on the head with a gun, according to Mrs. Price (W., 28). Falling, he "looked back and seen the one sitting behind defendants' counsel grab me by the leg and jerk me back in the gondola" (W., 28). "There was one white boy on the car that seen the whole thing, and that is that Gilley boy" (Price, W., 27); he was "in the gondola all the time the ravishing was going on" (W., 33).

There was no difficulty about producing the white boys. Their names were printed as early as March 26 in the Sentinel (Po., 6; Pa., 6; W., 6). They were kept in the prosecution's "control" (Po., 115; Pa., 110; W., 112). Gilley was called in one case only, the last, and in that case in rebuttal,—his testimony comes to nothing more than that he had seen the defendants in the gondola

*Both Mrs. Price and Miss Bates—although of course "there were no charges against us" (Po., 43)—were "held in jail since the 25th of March last month." "They keep us locked up at the jail, both of us locked up there" (Po., 43; see also W., 31).

(Po., 47-8). Thurman was not called as a witness in any case. None of the other five white boys was called as a witness in any case.*

(7) The charge was of a crime committed in an open car in broad daylight on a train that passed through Scottsboro and several other towns and villages. The prosecution was able to produce five witnesses that saw a fight on the train, including two that saw girls on the train (Po., 31, 32; Pa., 33, 34; W., 48-9, 50-1).** It produced none that said they saw a rape. In no case did the prosecution call as a witness for any purpose any trainman, flagman or signalman; any employee or official of the Scottsboro station or of any station; any person connected with the train or the road.***

(8) As to *all* defendants the juries accepted the stories of Victoria Price and Ruby Bates no matter how transparently insufficient might be the case against a given defendant. Upon the testimony of all witnesses there were several negroes on the freight train who were not apprehended or tried (*supra*, p. 7),—and an issue as to

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*No affidavit from any of the white boys was produced in opposition to the motion for new trial.

**These two witnesses—one 30 yards (W., 48), the other 100 yards (Pa., 34), from a train moving 35 or 40 miles an hour (see *e. g.*, W., 48)—gave some vague suggestion of violence being done to the girls. But neither made any allusion to any sexual act. And it is clear that they did not feel the resentment that would have been inevitable had they suspected a rape or attempted rape: "I did not pay any attention to the colored men. I just saw that one grab her and throw her down" (Robbins, Pa., 34; see also Morris, W., 48-50).

***The only person on the train or connected with its operation—except the prosecuting witnesses and the defendants—that at any time told what happened on the train was a Mr. Ricks, who was there from beginning to end. In support of the motion for new trial he made affidavit that he saw the girls get into a *box* car at Stevenson and that "they were in it when he last saw them until they got to Paint Rock" (Po., 107-8; Pa., 139; W., 105). The prosecution made no attempt to impeach Mr. Ricks or his affidavit.

every defendant was whether *he* had a part in the crime charged. The case of Roberson, one of the defendants in the Powell group, is instructive upon the point whether or not the jurors "discriminated":

Roberson's testimony was that he was not in the gondola car but lay seriously ill in a box car (Po., 36-7, 43-4); other negroes, who admitted the fight with the white boys and their own participation in it, confirmed that Roberson was not in the gondola (Po., 38, 42); a white witness, called by the prosecution, who was a member of the posse that met the train at Paint Rock, confirmed that he saw some one get off that part of the train where Roberson said he had been (Po., 45); a doctor called by the prosecution testified that he had examined Roberson and confirmed that Roberson was sick,—his condition such as to make participation in a rape "painful" (Po., 29).

Yet Victoria Price said Roberson had been "one of them that was running up and down inside of the car," etc., and had been "with the other girl" (Po., 25). The Gilley boy inclusively declared, "I saw all the negroes in that gondola" (Po., 47),—although he did not separately identify Roberson. Ruby Bates likewise said in general terms that all the five Powell defendants were in the gondola (Po., 26),—although she, too, did not separately identify Roberson and did not recall that incident of being herself raped by him to which Victoria Price had testified (Po., 26-7).

Roberson was convicted.*

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*In the Powell case the prosecution called in rebuttal four other witnesses for the purpose of identifying the several defendants. None of them added anything to the identification of Roberson:

The two that mentioned Roberson by name testified that they first saw him after he had been taken off the train and when he was in the group with the other negroes and under guard (Latham, Po., 44; Keel, Po., 47). One of the other two said, "I think that I saw that negro over there on the corner, on the end of the front row, on top of the gondola car" (Brannon, Po., 45). The fourth professed to identify the "negro on the end in front" as the man he saw "when the train was coming around the curve right below town"; "I could see them that far" (Rosseau, Po., 44-5).

(9) Over the penalties the juries had "discretion" (Code, §5407). In all cases and upon all accused the juries imposed the same penalty. "As to each of the eight defendants they went the extreme" (Anderson, C. J., Po., 173). In "leadership," in "age," there were "differences." The differences were ignored. The juries inflicted the death penalty alike upon the chief tried alone, upon his regular followers, and upon chance acquaintances first met upon the train,—upon Powell, whom no witness named as having intercourse with either girl (*infra*, p. 39). The juries meted out justice upon the same terms to "that old big boy" (Po., 24; Pa., 23) and to "the little bit of one" (W., 29).

If the trained and experienced judge is swayed by the feelings of the community, the circumstance is evidence that the jury is carried away,—evidence and cause. To us the conclusion is unescapable that the trial judge *was* swayed by the emotion of the occasion:

The judge first made an "appointment" of counsel that was invalid under the statutes of the State, and that if valid would have been insufficient to impose a specific responsibility upon any individual attorney. If ever he made an appointment even in form lawful, he did so on the last possible occasion,—on the day for which all trials were set, the day the first trial began. He acted with declared reluctance,—with an apology for the "imposition."*

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*Contrast Judge Cooley's statement:

The duty resting upon assigned counsel "is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime" (1 *Con. Lims.*, 8th Ed. [1927], 700).

A statute empowered the judge of his own initiative—the military being present—to change the place of trial. The judge directed the commander to intensify the military precautions. But the judge did not of his own initiative change the place of trial. When the defense took the initiative the judge exercised his discretion against the relief.

In the first case and again in the second, with lives at stake, the judge by the opening sentence of his charge let the jury know that all he demanded was their "attention for a few moments."

In three capital cases, involving eight defendants, the judge decided motions for new trial resting upon voluminous affidavits and raising far-reaching issues under the Constitution of the United States the day the motions were submitted. Denying a new trial in every case and as to every defendant, he sustained the death penalty even when inflicted upon a boy shown by evidence uncontradicted to be under sixteen,—in defiance of "the plain mandatory terms of the statute" (Powell Opinion, Po., 168).

IV.

Errors below relied upon here; summary of argument.

"In cases taken to the supreme court" of Alabama "no assignment of errors or joinder of errors is necessary,"—only a bill of exceptions (Code, §3258, Appendix). There are no assignments of error in these records.*

The errors the Supreme Court of the State in the denial of federal rights committed, and the points we urge, are in summary form as follows:

I. There was no fair, impartial and deliberate trial and there was therefore a denial of due process. The decision of the State Court is erroneous upon the authority of *Moore* vs. *Dempsey*, 261 U. S., 86.

II. Due process of law includes the right to counsel with its accustomed incidents of consultation with counsel and opportunity for preparation for trial and for the presentation of a proper defense at trial. That right in all effective sense was denied. The decision of the State Court is erroneous upon the authority of *Cooke* vs. *United States*, 267 U. S., 517, and of the whole line of decisions upon notice and opportunity to defend running back to *Pennoyer* vs. *Neff*, 95 U. S., 714.

III. The trial of petitioners before juries from which qualified members of their own race were—because of their race—systematically excluded and their conviction by such juries, was a denial of the equal protection of the laws. Objection to the exclusion was—allowance

*There are bills of exceptions (Po., 4-137; Pa., 3-161; W., 3-144), and these bills include the motions for new trial in which petitioners asserted their rights under the Constitution of the United States (*supra*, pp. 3-4).

being made for the circumstances—seasonably taken. The decision of the State Court is erroneous upon the authority of the line of decisions from *Neal* vs. *Delaware*, 103 U. S., 370, through *Martin* vs. *Texas*, 200 U. S., 316.

IV. The State Court misconceived the principles that underlie the claims of federal constitutional right. Its rulings affirming the propriety of the place and time of trial proceed upon grounds irrelevant to the issues here and upon reasoning demonstrably erroneous.

POINT I.

There was no fair, impartial and deliberate trial and there was therefore a denial of due process. The decision of the State Court is erroneous upon the authority of Moore vs. Dempsey (261 U. S., 86).

Moore vs. *Dempsey* (261 U. S., 86) settles the principle. A trial in circumstances of mob domination—in circumstances that preclude deliberation—is not due process of law. Conviction, confinement and death penalty after a trial so conducted constitute deprivation of liberty and life contrary to the Constitution of the United States.

The only question is whether—tested by the opinion in the *Moore* case and the facts in the *Moore* record—there was during trial mob domination. The question is whether the conditions of time and place and feeling made impossible a trial fair and deliberate. To arrive at the answer, we juxtapose the facts of the records at bar and the facts as shown by the *Moore* opinion and record,—setting forth (1) features demonstrably identical; (2) circumstances of mob domination here presented and in the *Moore* case presented in less degree or not at all; (3) the single item that in the *Moore* case was shown with more exactness of measurement than in the cases at bar,—but in these cases as certainly presented.*

(1)

(a) A "Committee of Seven and other leading officials" reminded the Governor of Arkansas a year after the event that at the time they "'gave our citizens

*Mr. Justice Holmes in the *Moore* case in certain instances read—as anyone dealing with a problem of the sort must read—between the literal lines of the record in order to capture the spirit of the proceedings in the trial court. It is partly for this reason, and also for the further reason that certain facts in the Moore record are not mentioned in the opinion that we make constant reference to the *record*.

their solemn promise that the law would be carried out' " (261 U. S., at 89).

In the cases at bar the day of the offense—as we learn from the newspaper of the next day—"Mayor Snodgrass and other local leaders addressed the threatening crowd and plead for peace and to let the law take its course" (Po., 8; Pa., 7; W., 7). "Calm thinking citizens" "realized that while this was the most atrocious crime charged in our county, that the evidence against the negroes was so conclusive as to be almost perfect and that the ends of justice could be best served by a legal process" (Po., 8-9; Pa., 8; W., 8).

(b) "The petitioners were brought into Court and informed that a certain lawyer was appointed their counsel" (261 U. S., at 89). "They were given no opportunity to employ an attorney of their own choice" (*Moore*, Rec., 5).

(c) Appointed counsel "had had no preliminary consultation with the accused" (261 U. S., 89).

(d) Moore and the others "were placed on trial before a white jury—blacks being systematically excluded" (261 U. S., 89).

(e) "The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result" (261 U. S., at 89).

In Scottsboro on March 25 after the arrest "a great crowd gathered at the jail,"—a "threatening crowd" (Po., 8; Pa., 7; W., 7); on March 31 at the first arraignment a "great crowd was present or tried to get into the court room" (Po., 11; Pa., 10; W., 10); on April 6 the Sheriff testified that "right now" there was present a "great throng" (Po., 95; Pa., 85; W., 92),—a throng that only the military, with its machine guns and tear

gas bombs, held back from "the court house." In the presence of this throng—"under orders of the court"—the Alabama commander issued "orders to his men" not to permit citizens to "come in the court house grounds with arms." The situation existed "on every appearance of the defendants." It "exists right now."*

(f) "Counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials" (261 U. S., at 89).

Counsel in the cases at bar did venture to hand up "a single copy" of a half-page petition for a change of venue, with newspaper exhibits (Po., 4-5, 92; Pa., 4, 82; W., 4, 89). But counsel did not have opportunity to make that preparation upon which a comprehensive exposition of the sentiment of the community depended (see *infra*, p. 55).

Counsel in these cases too did not "demand delay."

We can be certain there was no challenge to any juryman. For on the motion for new trial the State successfully objected to the inquiry whether even that question, which in the circumstances of this case was the most obvious, was put to jurymen (Po., 123, 125, 126, *et seq.*; Pa., 147, 148, 150, *et seq.*; W., 119, 120, 122, *et seq.*).**

In these cases too the defense did not "ask for separate trials,"—although its right was by statute absolute and although the prosecution, whose right was merely

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*In the *Moore* case there is no suggestion in the opinion or record that the crowd around the court room, or any member of it, was armed, or that there had been any use of firearms by anyone since the quelling of the disturbances nearly a month before the trials (*infra*, p. 43).

**There is no clear reference to the absence of challenges in the *Moore* record, if indeed any reference. There is merely a statement that there was "no objection to the petit jury or any previous proceedings" (p. 7). But the conclusion, which this Court drew, that there were no challenges was unescapable in the *Moore* case,—as for the same reasons the same conclusion is unescapable in the cases at bar.

discretionary, asked for the severances it wanted and obtained those severances.*

(g) The appointed counsel "cross-examined the witnesses, made exceptions and evidently was careful to preserve a full and complete transcript of the proceedings" (261 U. S., at 96, dissenting opinion).** In the *Moore* case as in the cases at bar there was the form of trial. In both cases there was only the form. In both cases the evidence was without discrimination found sufficient as to all defendants; in both cases the death penalty was imposed upon all defendants. "Jury and judge were swept to the fatal end by an irresistible wave of public passion" (261 U. S., at 91).

We pass now from circumstances of obvious and often of verbal identity to facts and features more strongly presented in the cases at bar than in the *Moore* case, or here presented and not presented in the *Moore* case.

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*The psychological effect of the successive trials was the same in the two sets of cases:

The Arkansas prosecutor first tried Frank Hicks, who was supposed to have fired the shot that killed Clinton Lee, and immediately thereafter the other 5 defendants together (see *Moore*, Rec., 81, 106).

The Alabama prosecutor first tried Weems, "that old big boy" (Po., 24, Pa., 23) and with him Norris, who implicated Weems (*supra*, p. 14). He next tried Patterson, the leader, alone. He finally tried Andy Wright, a regular member of the Patterson group (Po., 38). With Wright—after two verdicts imposing the death penalty had been rendered—the prosecutor brought to trial 4 other defendants, whose cases in other circumstances would have had particular strength: Powell,—who, Mrs. Price said, did not rape her (Po., 25) and who was not individually identified by either Mrs. Price or Miss Bates as having raped Miss Bates (Pa., 25, 27); Roberson,—seriously sick and declared by a number of witnesses not to have been in the gondola (*supra*, p. 31); Montgomery,—weak in one eye, the other eye "out" (Pa., 46), he too declared by various witnesses not to have been in the car (Pa., 45-6, 47, 49; Po., 39-40, 42); Williams,—the "little bit of one."

**The following pages of the *Moore* record illustrate this statement: 29; 31; 32; 36; 37; 41; 43; 47; 49; 50; 54. Seven witnesses were called. The exceptions in the cases at bar (taken, as the Court will observe, ever more infrequently as the trials progressed) are discussed at W., 153-8; Pa., 171; Po., 160.

(2)

(a) Moore and his companions were "poor and ignorant and black" (261 U. S., at 102, dissenting opinion). But they were grown men. They were moving spirits in an elaborate organization,—in the words of a witness of their own race "the head leaders" (*Moore*, Rec., 40; see also 31). The leader in the cases at bar was a boy under 21; in so far as the records show the ages, they show affirmatively that all the others were under 21.*

(b) Moore and his fellow petitioners "were citizens and residents of Phillips County, Arkansas" (*Moore*, Rec., 1). They were tried in Phillips County. The defendants in the cases at bar, on trial for their lives in Alabama, were residents either of Tennessee or of Georgia.

(c) The interval between occurrence and trials was twice as long in the *Moore* case as in the cases at bar:

The crime in the *Moore* case was on October 1, 1919 (*Moore*, Rec., 1); the trial was on November 3 (261 U. S., at 89; *Moore*, Rec., 27).

(d) There was no showing in the *Moore* case comparable to the showing here of publications "sensational and damaging" in the local press:

It was alleged in general terms in the *Moore* petition (*Moore*, Rec., 3) and accepted by this Court (261 U. S., at 88) that "inflammatory articles" appeared day by day. One of the articles the Moore record sets forth. That article appeared on October 7,—nearly a month before the trials (*Moore*, Rec., 11-14). And that article—highly colored as it was—carries no suggestion of lynch law and makes no charge and gives no intimation of the

*For the significance that this Court has attached—upon an issue of a state court's denial of rights under the Fourteenth Amendment—to the quality and circumstances of the particular negro prisoner, compare *Neal* vs. *Delaware*, 103 U. S., 370, 396.

individual guilt of any of the negroes who were subsequently brought to trial,—let alone of all of them.*

The articles in the Jackson County Sentinel name the defendants in "a crime without parallel" and declare the evidence—which includes "confessions"—"conclusive," "almost perfect."

(e) Counsel in the *Moore* case "called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand" (261 U. S., at 89).

In the cases at bar the defense did call witnesses. But they were all negroes against whom the same indictments lay and bearing the odium of the same "crime without parallel." In the first case, which foreshadowed the result in the subsequent cases, and again in the second case, these witnesses went back upon their fellow defendants (W., 55-8; Pa., 39-41).**

(f) Neither side summed up to the juries in the *Moore* case (*Moore*, Rec., 51). But consider the cases at bar. Nothing more clearly reveals the atmosphere that overhung all phases of all the trials than the following extract from the record in the first case, already partially quoted:

> "After both sides had closed their testimony, defendants' counsel stated to the court that they *did not care* to argue the case to the jury, but counsel

*There is mention in the article of "confessions" by certain negroes. But no one of the negroes subsequently brought to trial is named as making these confessions or as being implicated by them.

**In the *Moore* case two negro witnesses testified to the guilt of the defendants; but they were witnesses called by the *prosecution* (*Moore*, Rec., 31-45).

for the State stated to the court that they did wish to argue the case to the jury, and one of counsel for the State proceeded to argue the case to the jury. At the conclusion of said argument of counsel for the State to the jury, counsel for defendants stated that they *still did not wish* to argue the case to the jury, and objected separately and severally on behalf of the defendants to any further argument of the case to the jury by counsel for the State, on the grounds that after counsel for defendants had declined to argue the case to the jury any further argument on behalf of counsel for the State to the jury would be contrary to the law and the rules of practice of this court, and would be harmful and prejudicial to the interest of the defendants. The court overruled said objection and permitted counsel for the State to further argue the case to the jury * * *" (W., 59).*

(g) Applause over the rendition of a death verdict has a double significance: as an expression, and—in relation to later cases—as a cause, of mob emotion.** There is no reference in the *Moore* opinion or record to any applause in court room or court house or court house grounds or anywhere. There was no "hollering," "shouting," "whoopee"; no amplifier; no band.

(h) The military played no part during the *Moore* trials:

The Governor of Arkansas at no time called out the National Guard. He did, on October 2, call on the commander at Camp Pike to send United States soldiers

*For an incident hardly less striking at the conclusion of the Powell case, see Po., 48.

**_Frank_ vs. _Mangum_, 237 U. S., 309, attests the importance of court-room incidents even where the feature of successive trials is not presented. Two of the justices thought that a strong showing of applause and feeling in the court room, standing substantially alone, established a denial of due process.

(*Moore*, Rec., 95), and some were at that time sent. But these soldiers promptly put an end to the disturbances (*Moore*, Rec., 2-3, 15, 89).* There is no suggestion that any soldiers, federal or state, were around at the time of the *Moore* trials. There is on the contrary affirmative indication that soldiers were not around (*Moore*, Rec., 98).

In the cases at bar the Chief Justice of the State had this to say:

"Every step that was taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers removed the defendants to Gadsden for safe-keeping, soldiers escorted them back to Scottsboro for arraignment, soldiers escorted them back to Gadsden for safe-keeping while awaiting trial, soldiers returned them to Scottsboro for trial a few days thereafter, and soldiers guarded the court house and grounds during every step in the trial and, after trial and sentence, again removed them to Gadsden" (Po., 172).

The Alabama Chief Justice has had better opportunity than any other man to get an insight into the way the minds of Alabama jurors work. His conclusion is:

"Whether this was essential to protect the prisoners from violence, or because the officials were over apprehensive as to the condition of the public mind, matters little as this fact alone was enough to have a coercive influence on the jury."

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*This Court's opinion notes that "*shortly after the arrest* of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops" (261 U. S., at 88). And the dissenting opinion alludes to "the disorders of *September*, 1919" (at 101).

(3)

There is but one concrete respect in which the *Moore* record went beyond these records in the demonstration that the prisoners had only the *form* of trial. The petition in the *Moore* case recited that the trial lasted less than an hour and that the jury's verdict was brought in in a few minutes (*Moore*, Rec., 5). The *Moore* case was upon demurrer and this Court accepted these allegations (261 U. S., at 87, 89).

In the cases at bar there is no such mathematically exact statement. As a practical matter there could be none:

The practice in Jackson County does not, as the records show (Po., 53; Pa., 53; W., 63), take note of the time a jury goes out or returns. The ignorant and frightened boys who were the defendants were in no position to estimate the length of the trials or of the juries' "deliberations." Mr. Roddy and Mr. Moody might indeed have done so. But they had no part in the affidavits that raised the constitutional issues.*

Plainly, if there had been extended deliberations, the prosecution would have had no difficulty in establishing such a fact. For it would have been at least as easy to procure affidavits from the prosecutors themselves, as, let us say, from sheriffs and deputy sheriffs (compare W., 137, 139, 140, 142),—not to speak of per-

*Compare *Downer* vs. *Dunaway* (53 F. [2d], 586; December, 1931),—a decision of the Circuit Court of Appeals in the Fifth Circuit granting, on the authority of *Moore* vs. *Dempsey*, a petition for *habeas corpus* in a situation like that in the *Moore* case and in the cases at bar. Speaking of counsel assigned on the day of trial to defend a negro accused of rape, Judge Bryan says:

> "Counsel who represented appellant may have construed their appointment as covering only the actual trial, such as impaneling the jury, examining and cross-examining the witnesses, and making arguments in the case; and not as including the making of motions for continuance, change of venue, and a new trial" (p. 589).

sons without official position like the editor of the Jackson County Sentinel (Po., 134; Pa., 158; W., 135). The prosecution attempted no such showing.

The gross facts are clear:

Three capital trials with 8 defendants were completed in three days.

The Powell case involved 5 defendants. *After* 6 witnesses had testified in the Patterson case, and *after* the judge had charged the jury in that case (Pa., 42, *et seq.*; Po., 2-53),—on that same day the Powell case commenced. And the Powell jury found time—still on the same day—to bring in a verdict that all defendants were guilty and that all defendants must suffer the extreme penalty.

The only other matters that could even be suggested as pointing to a more flagrant denial of the essentials of due process in the conduct of the Moore trials than in the conduct of the trials at bar are matters of mere conclusion. There were general statements in Moore's petition to the effect that "there never was a chance for the petitioners to be acquitted;" that "no juryman could have voted for an acquittal and continued to live in Phillips County;" that "if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob" (261 U. S., 89-90).

Such conclusions cannot be compared for substance to concrete facts like the prisoners, under military guard, being carried to court at night; their parents fearing to come to Scottsboro or even to Gadsden; applause in the court room on the rendition of the death verdict.*

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*It is hardly necessary to say that this Court noted the merely conclusory quality of these declarations in the Moore petition. Observe the prefatory phrase in the opinion, "according to the allegations and affidavits" (261 U. S., at 89).

At the outset we stated—we have by minute analysis now demonstrated—the following as a summary formulation of the comparison between the cases at bar and the case upon which this Court has ruled:

In essentials the cases are identical; in many respects the showing of mob domination is clearer and stronger in the cases at bar,—some important points definitely established here were not shown in the decided case; in the only respect where the showing here is less mathematically precise, the difference is in the mechanics of proof concerning a fact whose existence is in no doubt.

The argumentation in the Alabama Supreme Court directed the Court's mind explicitly to the comparison of the *Moore* case and the cases at bar; for the briefs of all defendants cited the *Moore* opinion over and over again. And the State Court, although it approached the matter from a different angle, did turn to a comparison of the *Moore* case and the cases before it. But only by the *general* statement that difference there was did the majority below purport to reconcile its decision with the decision of this Court,—not one circumstance of distinction did it *specify* (Po., 158). The Chief Justice in his dissent reasoned in the same way as did this Court and to the same conclusion,—that the accumulation and combination of conditions and influences kept the trial from being fair and the process from being due (Po., 174).

The grounds on which the majority proceeded below are the same grounds on which the Arkansas Court unanimously sustained the conviction of Moore:

The Alabama Court affirmed the convictions essentially because it found no exceptions well taken (compare W., 154-5; Pa., 177; Po., 163). "The trials were had according to the law," said the Arkansas Court (*Moore*, Rec., 66). The point is irrelevant in the cases at bar as it was found to be in the *Moore* case. Whether or

not the local law as expounded by the local court justified the withholding, for example, of a change of venue, it remains true that conviction in the circumstances of the place and time constituted a deprivation of life and liberty in defiance of the Fourteenth Amendment. But neither Court grasped the due process requirement of the Constitution of the United States.

The Alabama Court certified that Mr. Moody was "an able member of the local bar" (Po., 170). The Arkansas Court remarked that "eminent counsel was appointed to defend appellants" (*Moore*, Rec., 66). Neither Court addressed itself to the question whether a designation coming on the day a series of capital trials commenced could be in the constitutional sense valid.

The Alabama Court concluded that, "having made no objection to the personnel of the jury on account of race or color, the defendants are in no position to put the court in error, in the contention made for the first time on motion for new trial" (Po., 162). The Arkansas Court decided the same issue the same way,—"the question was raised in the motion for a new trial, and it, therefore, comes too late to be now considered" (*Moore*, Rec., 65; and see 261 U. S., at 91). Neither court inquired whether the rule was applicable in circumstances that made earlier protest impracticable or impossible.

* * *

This Court in the *Moore* case granted relief by the remedy, collateral and extraordinary, of *habeas corpus*,—a remedy whose basis is a challenge to the jurisdiction (compare 261 U. S., at 91). It cannot, we submit, sustain the judgments at bar against direct attack.

POINT II.

Due process of law includes the right to counsel and its accustomed incidents of consultation with counsel and opportunity for preparation for trial and for the presentation of a proper defense at trial. This right was in all effective sense denied. The decision of the State Court is erroneous upon the authority of Cooke vs. United States, 267 U. S., 517, and of the whole line of decisions upon notice and opportunity to defend running back to Pennoyer vs. Neff, 95 U. S., 714.

"With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel" (1 *Cooley, Con. Lims.* [8th ed., 1927], p. 700, collecting authorities).

The principle is a due process principle. "Due process of law," declared Taft, C. J., "includes the assistance of counsel, if requested, and the right to call witnesses to give testimony" (*Cooke* vs. *United States,* 267 U. S., 517, 537). The underlying doctrine goes back to *Pennoyer* vs. *Neff* (95 U. S., 714).

The right to counsel is given with "all its accustomed incidents,"—this "the Constitution secures" (1 *Cooley, Con. Lims.* [8th ed., 1927], p. 700):

"The right to the aid of counsel includes the right to communication and consultation with him" (*Cooley,* footnote 5, collecting numerous cases). "The constitutional guaranty that one shall have the right to be represented by counsel means nothing if it does not mean that he shall have reasonable time in which to state the facts of his case to counsel after they

are employed or appointed, and to be advised" (*Jackson* vs. *Commonwealth*, 215 Ky., 800, 802). "Benefit of counsel either means something or it means nothing. To promise the benefit of counsel and then render the service ineffective is, as Judge Blandford once remarked, 'to keep the word of promise to the ear and break it to our hope'" (Russell, C. J., in *Sheppard* vs. *State*, 165 Ga., 460, 464 [1928]).

The right is broadest in a capital case. "The intense strain involved in the responsibility of defending one whose life is at stake is such as can scarcely be described in words; and altogether aside from inquiry into the facts of the case and legitimate inquiry so far as possible into the character of the jurors, as much time and thought are required to consider and determine what course of action shall be pursued in defending one whose life is at stake as in important civil cases where many thousands of dollars are involved" (*Sheppard* vs. *State*, *ibid.*).*

The right to counsel is "universal" and "constitutional." The right is included in due process. It is given

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*Sheppard was forced to trial in a capital case a week after the crime and the day counsel was appointed. His conviction was reversed.

Report No. 11 of the National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Government Printing Office, Washington, 1931) quotes with approval the passages we have quoted from Mr. Justice Russell's opinion.

with "all its accustomed incidents." It has its furthest scope where "life is at stake."*

It remains to apply these rules to the records.

The extent of defendants' *own* capacity for the preparation and presentation of their cases can be measured by obvious facts. "The defendants had no opportunity to prepare their defense, as they were kept in close custody from their arrest until the trial" (*Mitchell* vs. *Commonwealth*, 225 Ky., 83, 84 [1928]).** They were "ignorant,"—all but one "illiterate" (*People* vs. *Nitti*, 312 Ill., 73, 89, followed in *Sanchez* vs. *State*, 199 Ind., 235, 246).***

Defendants' families and friends were in no different case. With their sons about to be put on trial for their lives or actually on trial for their lives, the parents were afraid to go to Scottsboro,—afraid even to go to Gadsden. "Parents, kinsfolks" had no communication with their boys.

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*Clearly settled though these principles are, the Court below seems to have overlooked them altogether. It nowhere treats the right to counsel as constitutional.

A recent state court decision directly contrary to the decisions below is *Commonwealth* vs. *O'Keefe*, 298 Pa., 169. The day counsel was procured the accused was tried. He was convicted and a sentence of 9 months' imprisonment and $1,000 fine imposed. The Court declared "the real question" to be whether this treatment "deprived the defendant of his constitutional rights." Citing *Cooke* vs. *U. S.* and numerous other decisions here it held the proceeding a violation of the Fourteenth Amendment.

**The Kentucky Court, in circumstances much like those in the cases at bar—the National Guard had been called out, etc.—reversed the conviction of a negro charged with killing a white man and tried a week after the alleged offense and a few days after "he had *employed* an attorney."

***There was no question of mob domination in the *Nitti* and *Sanchez* cases. The defendants in those cases were foreigners; the convictions were reversed because representation by counsel was inadequate. For judicial recognition that at least as much allowance is to be made for negroes in a case where "race prejudice has been aroused and public excitement prevails" compare *Mitchell* vs. *Commonwealth*, 225 Ky., at 85, *supra*.

If then anything was to be done for the boys only counsel could do it. Never was there a case in which the need for counsel was greater. Never was there a case that called for standards more liberal in measuring the right to counsel and the scope of its necessary incidents.

The "appointment" of March 31 was void. The law allows the designation of not more than two. All the lawyers were to "defend" all the boys. "The court did not name or designate particular counsel, but appointed the entire Scottsboro bar, thus extending and enlarging the responsibility and, in a sense, enabling each one to rely upon others" (Anderson, C. J., Po., 172). Such a designation would not be, within the meaning of the due process clause of the Constitution of the United States, valid even if it were permitted—as in fact it was prohibited—by local statute. Everybody's business, it is proverbial wisdom, is nobody's business.

The only question then that merits even discussion is whether on April 6 there was an appointment constitutionally valid. Of the designation that day attempted all the following things are true:

(a) Defendants' utter helplessness continued right down to April 6. On that day "they did not know who would be their counsel and they had been in jail ever since they were arrested, March 25, 1931, and had no opportunity to employ counsel and no money with which to pay them and had no chance to confer with their parents, kinsfolks or friends and had no chance to procure witnesses" (Po., 80; Pa., 111-2; W., 78; see also Po., 83; Pa., 114; W., 80).

(b) The boys were not asked whether they had counsel or what counsel they wanted. They were at most, "informed that a certain lawyer was appointed their counsel" (261 U. S., at 89).

Nor would a suggestion to the boys that they or their families employ counsel—reasonable time being given—have been an empty formality. The conclusive fact, which Anderson, C. J., points out (Po., 172-3), is that the boys' connections subsequently procured counsel of their choice.*

(c) There was not so much as the form of a true *appointment*. The judge exercised no discretion in the selection of counsel. He said merely that "*all* the lawyers that will" assist Mr. Roddy might do so (Po., 91; Pa., 81; W., 88). When one lawyer declared his readiness to "help Mr. Roddy in anything I can do about it, under the circumstances," the Court at once accepted that lawyer (Po., 91; Pa., 81; W., 88).**

(d) The zeal of counsel thus not appointed—merely accepted—was not kindled. It was dampened. The Court in terms and twice over characterized what should have been a call to duty as an "imposition."

(e) The chief counsel—the local lawyer merely "helped"—was "not familiar with the procedure in Alabama;" had not had "an opportunity to prepare the

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*As a matter of fact General Chamlee had acted for the Patterson family in another connection and before the prosecution of their son (Po., 75; Pa., 98; W., 73).

**Mr. Moody, the lawyer whose offer was taken, had apparently not even seen the boys before April 6:

Evidently referring to the proceedings of March 31—for it is uncontradicted that no lawyer saw the boys either in the Scottsboro jail or in Gadsden prison (*supra*, p. 18)—Mr. Moody says:

> "*Most* of the bar have been down and conferred with these defendants in this case; *they* did not know what else to do" (Po., 58; Pa., 79; W., 86).

The italicized words indicate that Mr. Moody had *not* been one of the lawyers that saw the boys at the time of the indictment on March 31 and the abortive arraignment on that day.

case" and "had not prepared this case for trial" (Po., 89; Pa., 80; W., 87); was "here just through the courtesy of your Honor" (Po., 90; Pa., 80; W., 87). He urged "your Honor to go ahead and appoint counsel;" told the Court, "I think the boys would be better off if I step entirely out of the case" (Po., 90; Pa., 80; W., 87); and, at the end of the long colloquy, modified his position only thus far:

> "If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent" (Po., 90; Pa., 81; W., 88).*

(f) Overwhelmingly important, the "appointment" was made the day that—in circumstances of prejudice, passion and extraordinary difficulty—the trial of three capital cases involving eight defendants was commenced.

The authorities settling it that the right to counsel is constitutional and that it is included in the due process concept, impose no requirement that the defendant show that his case, properly prepared and presented, would have been different in character or result. No defendant who has *not* prepared a case—who has *not* had time for consultation, investigation and the procuring of witnesses—can tell what case he *might* have made. No one—to pass from the general problem to the particular situation—can tell what the juries would have done had counsel had time and opportunity to find the facts and put the facts before them.

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*Addressing itself directly to Chief Justice Anderson's dissent, the majority of the Court "think it a bit inaccurate to say Mr. Roddy appeared only as *amicus curiae*" (Po., 170). But the fact is uncontradicted that the only lawyer any of the defendants at any time *employed* was General Chamlee (Po., 75-6; Pa., 98; W., 73). Nor did the court in Alabama purport to *appoint* a lawyer from Tennessee.

Although there thus is and can be no requirement that one complaining of the denial of the constitutional right to counsel concretely show the effects of the deprivation, certain indications are in these records so patent that we list them. By the records we shall show the effect of the absence of preparation (1) upon the proceedings and investigations that precede trial, (2) upon the trials. We shall see how right was the statement of the Alabama Chief Justice:

> "The record indicates that the appearance was rather *pro forma* than zealous and active" (Po., 173).

(1)

An objection to the constitution of a grand jury "based on allegations of facts not appearing in the record" "if controverted by the attorney for the State, must be supported by evidence on the part of the defendant" (*Carter* vs. *Texas*, 177 U. S., 442, 447).* Attorneys who only a few moments before pleading to the indictment declare themselves ready to "help," to "do anything I can about it, under the circumstances," cannot get such evidence.

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*The Alabama practice is particularly strict against objections to an indictment. Any objection to the formation of the grand jury must be taken "in all cases before a plea to the merits" (Code, §5203, Appendix; see also §5202 purporting to wipe out all objections to the constitution of a special grand jury). While such restrictions of local practice are not binding upon the *federal* courts upon issues of due process and equal protection (*infra*, p. 62), it remains true that in order to maintain those rights that the *state* law gives their clients, counsel have to act with utmost promptness.

A defendant who moves for change of venue must "set forth specifically the reasons why he cannot have a fair and impartial trial in the county" (Code, §5579; see Appendix). "The burden of proof was upon the defendants to show that they could not get a fair and impartial trial in Jackson County, before the court would have been justified in granting the change of venue moved for" (Powell Opinion, Po., 157).

A "burden" so heavy it takes time to discharge. The Kentucky Court in a late opinion dealing precisely with mob domination, shows why—for the right to a change of venue to be effective—there must be *time* to prepare the motion. " 'It may happen that the strong feeling against the defendant in a county which prevents his having a fair trial may prevent him from obtaining witnesses to so testify on his motion for a change of venue' " (*Estes* vs. *Commonwealth,* 229 Ky., 617, 620).

The Alabama practice, too, permits witnesses to be called on a motion for change of venue. But the only persons that Mr. Roddy and Mr. Moody called as witnesses, or doubtless in the circumstances could call, were two men—the Sheriff and the Major of the Guard—who happened to be present in the court room. The lawyers could not "*obtain* witnesses."

The upshot is:

The Alabama Supreme Court found no error in the refusal of the defendants' motion for change of venue because they did not "meet and discharge" the burden of proof (Po., 158). Defendants had no time in which to do the things essential to discharge their burden.*

*The following passage in the Patterson opinion well illustrates how the time factor stood in the way of defendants' motion for change of venue:

"As to the publications appearing in The Montgomery Advertiser and the Chattanooga paper, there was no evidence showing

(*Footnote continued on next page.*)

Counsel in advance of a trial have not only to make motions. They have to find out the facts and discover the witnesses to the facts,—in the cases at bar, for lawyers whose connection began on the day of trial, a task impossible of accomplishment.

The charge was of a crime in a moving train that covered 50 miles while the assaults were supposed to be taking place, and that passed through a number of towns and villages. Counsel accepted on the morning of trial could not make an investigation along this route and in these places.

The defendants were all non-residents. Counsel present, from the moment trial began, in an Alabama court room, could not hunt up character witnesses in Georgia and Tennessee.

The character and reputation of the complaining witnesses were not, so the Alabama Court held, in these cases at issue, either directly or upon cross examination.* But the girls' movements on the night before the occurrence had—in view of the medical testimony (Po., 29; Pa., 30-1; W., 33-8)—a specific relevancy. These girls that in overalls (Po., 24) came on a freight train from Chattanooga—which was not the home of either (Po., 22, 26)—

(*Footnote continued from preceding page.*)

to what extent, if any, said papers were circulated in the county from which the jurors were to be drawn, and in the absence of such proof these publications were entitled to little or no weight" (Pa., 168).

Counsel—given a little time—would of course have been able to show that daily papers published in the capital of the State or in an important city near the state line circulated in the County (compare Po., 119, Pa., 142, W., 114).

*See *supra*, pp. 16-17.

gave hazy reports of their doings in that city on the night of March 24-25. They named the street on which they stayed, but could not describe the street. They could not remember the number of the house (W., 26, 43; Pa., 25, 29; Po., 27). The defense—had there been an effective right to counsel—would certainly have attempted to find out about the girls' comings and goings, and would likely have succeeded.* Counsel could not, while trial was in progress, attempt any such thing.

The result was that the only witnesses any of the defendants had were witnesses drawn from their own ranks. All the witnesses were negroes.** All were under indictment for "a crime without parallel."

The defense—even though it thus drew from its own ranks only—did not know what witnesses to call or what the witnesses it called would say. Take as a flagrant instance the witness Roy Wright. This boy was not a defendant in the case in which he was called or indeed in any of the three cases below. There was no tactical reason for putting him on the stand. There was on the contrary grave danger in using him,—a danger that the most elementary preparation would have uncovered. It was shown by an article in the Sentinel, filed by the defense itself on the morning of April 6 as an exhibit on the venue motion, that "one of the *younger* negroes"

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*Witness the vast amount of detail General Chamlee was later able to develop concerning the girls' past lives (Pa., 63-77, 133-137; Po., 102-105; W., 99-103).

**As an indication of community attitude toward the testimony of colored persons see the reference in an affidavit by the editor of the Jackson County Sentinel to "some affidavits which had been made by some negroes" (Po., 135; Pa., 158; W., 135); that this Court may take judicial notice of the likelihood of prejudice against negro testimony compare *Aldridge* vs. *United States*, 283 U. S., 308.

had been "taken out by himself" and had said that " 'the others did it' " (Po., 7; Pa., 6; W., 6). Roy was only 14,—the youngest of all the boys. Yet the *defense* called Roy,—and the testimony he gave was that there had been raping by the older negro boys (Pa., 38, 39, 41).

Of the right to counsel the incident most "necessary" is consultation. It is the incident from which the right takes its name. In a capital trial the lawyer for the defense calls a witness who may be expected to contradict the case for the defense and does contradict the case for the defense,—this can be only when between client and counsel there was no consultation, when the lawyer "had no preliminary consultation with the accused" (261 U. S., at 89).

(2)

The demonstration already given is conclusive, not only that the right to counsel was denied, but that the denial deprived the accused of all real defense. When appointment is made so late as to make impossible "inquiry into the facts of the case"—so late as to preclude preparation—, then indeed "the benefit of counsel" is "promised," but "the service rendered ineffective." It is worth while bringing together, however, the indications supplied by the records that the cases thus not prepared were for practical purposes not even *presented:*

The motion for change of the place of trial was perfunctory,—there was no argument in support; a motion for change of the time of trial was the most important and—to lawyers charged on the very day of trial with responsibility for the cases the most obvious—of all motions,—but it was not made; there was no demand for severances,—although the issue of identification was cardinal and the right of the defense to separate trials absolute; there was no opposition to the severances the

prosecution requested; there could be no "legitimate inquiry into the character of the jurors" (*Sheppard* vs. *State, supra*), and there were no challenges; there was no opening address for any defendant; there are a handful of exceptions to rulings on evidence in the first case, 4 in the second case, in the third with 5 defendants 2; in no case did counsel for the defense sum up for any client,—nor did they demand in return for the waiver of a right so fundamental a corresponding waiver by the prosecution; in no case did the defense submit a single instruction to the jury; in none did it take a single exception to the charge.

• • •

We saw in our first point that there was in the constitutional sense no trial. We have seen in this point that there was in the constitutional sense no representation by counsel. Boys tried upon charges that threatened their lives did not have "reasonable opportunity to meet them" (*Cooke* vs. *United States*). Their defense had only the semblance of presentation. It had no preparation.

POINT III.

The trial of petitioners before juries from which qualified members of their own race were—because of their race—systematically excluded and their conviction by such juries, was a denial of the equal protection of the laws. Objection to the exclusion was—allowance being made for the circumstances—seasonably taken. The decision of the State Court is erroneous upon the authority of the line of decisions from Neal vs. Delaware, 103 U. S., 370, through Martin vs. Texas, 200 U. S., 316.

(1) "An accused is entitled to demand, under the Constitution of the United States," that "in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color" (*Martin* vs. *Texas*, 200 U. S., 316, 321).

To the same effect

Virginia vs. *Rives*, 100 U. S., 313, 321;
Rogers vs. *Alabama*, 192 U. S., 226, 231;
In re Wood, 140 U. S., 278, 285.

(2) The Fourteenth Amendment is a prohibition upon the *state*. It matters not, therefore, how the state works the exclusion,—"whether through its legislature, through its courts, or through its executive or administrative officers." If "all persons of the African race are excluded solely because of their race or color," then a defendant of that race may say "the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States" (*Carter* vs. *Texas*, 177 U. S., 442, 447, collecting earlier authorities).

In accord

Rogers vs. *Alabama*, *supra*;
Neal vs. *Delaware*, 103 U. S., 370.
Martin vs. *Texas*, *supra*;

(3) Where the fact is established that the colored population is considerable and that colored men are never included in juries, there is "presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States" (*Neal* vs. *Delaware*, 103 U. S., 370, 397).

(4) The fact of systematic exclusion is shown in the cases at bar in the same way as it was shown in the *Neal* case: "By reason of a custom of long standing there was not one negro selected for the entire trial, throughout the whole county with a population of 30,000 people when a large number of negro landowners were qualified jurors, or for jury service" (Po., 84; Pa., 115; W., 82). The fact of exclusion is indeed tacitly admitted by the Supreme Court of the State (Po., 162-3).

(5) What the Alabama Court contends is (a) that the *statute* is unobjectionable: "The jury laws of Alabama do not exclude any man from jury service by reason of race or color" (Po., 162); (b) that "by failing to object to the personnel of the jury the defendant must be held to have waived all objections thereto" (Po., 162).

Neither point has merit:

(a) The precise proposition that it is immaterial whether the exclusion be by legislative enactment or by systematic official action was, as we have just noted, decided over and over again in the line of cases from *Neal* vs. *Delaware* through *Carter* vs. *Texas* and *Rogers* vs. *Alabama* to *Martin* vs. *Texas*.*

*The unanimous Maryland Court very recently decided the point in a noteworthy opinion, by Bond, C. J., which reviews all the authorities in this Court. It reversed the conviction of a negro because the officer charged with drawing up the jury list never included negroes (*Lee* vs. *State* [July, 1932], 161 Atl., 284, not yet reported officially). The decision is directly contrary to the decisions below.

(b) "The law of the United States cannot be evaded by the forms of local practice" (*American Railway Express Co.* vs. *Levee*, 263 U. S., 19, 21, citing *Rogers* vs. *Alabama*, 192 U. S., at 230). "The question whether a right or privilege, claimed under the Constitution or laws of the United States," was "brought to the notice of a state court, is itself a Federal question" (*Carter* vs. *Texas*, 177 U. S., at 447). In the precise case of the composition of juries the principle has over and over again been applied that the federal right to equal protection is not to be defeated by any principle of state practice clogging the mechanics of its assertion.

In re Wood, supra;
Rogers vs. *Alabama, supra;*
Carter vs. *Texas, supra.*

In the cases at bar the defendants could not in any practical and human sense "have objected to the personnel of the jury." They were without counsel and without opportunity to prepare. By failing to assert their right to equal protection at a time they could not assert it, they did not lose the right. Due process of law and equal protection of the laws "overlap" (*Truax* vs. *Corrigan*, 257 U. S., 312, 332). It cannot be that where a mob dominates and all effective right to counsel is denied—that where, and essentially because, due process is withheld—the claim to equal protection is foregone.

In *Moore* vs. *Dempsey*, too, no statute worked exclusion. In that case, too, there was no objection to the composition of the juries. This Court did not close its eyes to the fact that the jury was "white",—"blacks being systematically excluded."

POINT IV.

The State Court misconceived the principles that underlie the claims of federal constitutional right. Its rulings affirming the propriety of the place and time of trial proceed upon grounds irrelevant to the issues here and upon reasoning demonstrably erroneous.

Proof that reasoning is mistaken reenforces the demonstration that results are unsound. In conclusion we analyze therefore the chief opinion and show:

I. The State Court does not arrive at the essentials of any of the three issues of federal constitutional right,—its treatment is in the literal sense negligible.

II. The long discussion of the place of trial is both irrelevant to the issues as here defined, and illogical.

III. The cursory reference to the time of trial is charged with errors that this Court has exposed.

I.

The State Court's misconceptions of federal constitutional rights.

"The record before us fails to show that any right guaranteed to the defendants under the Constitution of the United States was denied to the defendants in this case: on the contrary, the record shows that every such right of the defendants was duly observed, and accorded them" (Powell Opinion, Po., 163-164). The foregoing is the declaration of a conclusion merely. There is nowhere a statement of reasons. But it is not difficult to arrive at the State Court's basic conceptions or to expose its errors.

As to the right to orderly and deliberate trial: The Court considers the influences and incidents singly. It considers indeed only such matters as a motion made or an objection taken in conformity with local practice brings to its attention. The upshot is that it reduces the whole inclusive problem of fairness essentially to an issue concerning the motion to change the place of trial.

The error is in forgetting that a trial is a whole thing,—that the place, the time, the feeling, the demonstrations, the military force, the absence of prepared counsel, the composition of the jury in their effects converged.

As to the rights of counsel: The Court in truth gives no consideration. The only reference is in what really is a supplement addressed in terms to the dissenting opinion (Po., 169). The discussion does not rise above details and personalities: The Chief Justice's characterization of the Tennessee lawyer as an *amicus curiae* is called "a bit inaccurate;" the professional distinction of the Alabama lawyer is asserted (Po., 170).

The error is in ignoring that where in a capital case counsel are appointed or accepted the day trial begins, there can be no preparation,—of necessity there is denial of a right "universal" and "*constitutional.*"

As to equal protection: The Court confines its discussion to the words of the statute. It applies a rule of practice whose effect, in the circumstances of these cases, is to shut out the consideration that by systematic official action the statute was set at naught.

The error is in considering practice and form to the exclusion of fact.

As to no one of the three problems of federal constitutional right does the State Court so much as come to the issue.

II.

The reasoning as to place of trial.

The State Court—which on points of local practice eliminated other aspects of the issue of fairness of trial*—discusses at length the place of trial. But the discussion is (1) irrelevant to the issues as they are here defined and (2) illogical.

(1) *Irrelevant* the discussion is to the issues here because the State Court never envisages the question as one of constitutional right. It never asks,—Did the convictions in Scottsboro, in view of the circumstances of the time, the demonstrations, the presence of the military, etc., accord with due process? It asks only,—Was there as matter of local law error in denying the motion for change of venue?

The Court's reference to *Moore* vs. *Dempsey* makes strikingly clear the angle of its approach. The reference comes (Po., 158) in the discussion of "change of venue" (Po., 150-159). Upon issues under the Constitution of the United States the decision of this Court is not cited.

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*It disposes of the issue as to the time of trial essentially by saying that no motion for continuance was made (*infra*, p. 69); it rules that demonstrations at the rendition of verdict cannot be shown by evidence *aliunde* (*supra*, p. 24).

(2) *Illogical* the discussion is, as witness the following:

(a) "The petition does not charge that any actual violence, or threatened violence, was offered the prisoners" (Po., 151). Whether or not petitioners—under military guard and locked in prison—heard threats, the uncontradicted fact is that the crowds were, and ever since March 25 had been, "threatening."

(b) " 'It is my *idea,* as sheriff of this county, that the sentiment is not any higher here than in any adjoining county' "; " 'I *think* the defendants could have as fair trial here as they could in any county adjoining.' " The Court quotes and invokes such statements as these by Sheriff Wann, and like statements by Major Starnes of what he " *'thought'* " and of his " *'judgment'* " (Po., 155-6). A trenchant decision has exposed the fallacy—where the issue is of community sentiment—of relying upon "the mere opinion statements of witnesses": Witnesses "themselves might be influenced the one way or the other because of the prevailing sentiment." "The proven and undisputed circumstances," the Kentucky Court concludes, "speak louder and more convincingly" (*Estes* vs. *Commonwealth,* 229 Ky., 617, 619-620 [1929]).*

*The Alabama Court in an earlier case made the same ruling as to the relative weight to be given to circumstances and opinions that the Kentucky Court made (*Seams* vs. *State,* 84 Ala., 410). A negro was indicted for the murder of a well-known white man. The trial was held while the prisoner was under military guard, and there were other circumstances of extreme pressure. He was convicted. The Court reversed for the denial of change of venue and said, with italics:

(*Footnote continued on next page.*)

The point applies—especially in view of the Court's insistence upon the presence or absence of violence as the test—with peculiar force to the two witnesses in question. The last persons to whom intimation of threatened violence would be given would be the two officials charged generally with maintaining order and specifically with protecting the prisoners.*

(c) "The judge of the court did not direct the plaintiff to call for the militia, nor did the judge of the court make any request upon the Governor for the militia",—the point "should be stated" (Po., 154). On the day of the occurrence the Governor, at the request of the Sheriff, called out the militia,—before the judge called the session of the court or even came to Scottsboro (see Po., 8; Pa., 7; W., 7-8), before it was possible for the judge to "make any request upon the Governor." What the *judge* did was this: With the militia there, and ready with rifles, machine guns and tear gas bombs, the judge gave "orders" making even more stringent the precautions the Sheriff and the military commander had adopted,—orders to the military to search citizens for arms.

(*Footnote continued from preceding page.*)

"In arriving at a conclusion on this subject the court is to be governed more by the *facts* of the case, as proved or admitted, and legitimate inferences from them, than by the mere *opinions* of witnesses, which are unsupported by facts" (84 Ala., at 413).

For a terse statement of the same principle in a neighboring jurisdiction, see *Brown* vs. *State*, 83 Miss., 645, 646.

*One of the witnesses was for an additional reason obviously without authority to speak about sentiment in Jackson County. Major Starnes came into Jackson County from Guntersville in Marshall County. He stayed with his picked men at Gadsden in Etowah County. He himself in an extract that the Court quotes (Po., 156), speaks of his trips "over to Scottsboro in Jackson County."

It may be noted that the defense did not ask for opinion evidence from Sheriff Wann or Major Starnes; it interrogated these officers concerning concrete facts,—the forces under their command, etc. (Po., 93-4, 95-7; Pa., 83-4, 85-8; W., 90-1, 92-5). It was the prosecution that on what purported to be cross-examination (Po., 94-5, 98; Pa., 84-5, 88-9; W., 91-2, 95) elicited the statements that the Court made its own.

"Mere mistakes of law," as the *Moore* opinion remarks, are not here to be corrected (261 U. S., at 91). But the same opinion notes fallacy in the State Court's reasoning upon points of the sort.* It is relevant, therefore, to remind this Court that the State Court's decision upon the venue motion is contrary to precedents established in other jurisdictions, and to note that the decision is inconsistent too with earlier precedent in the same jurisdiction:

The gist of the decision is that in the Court's view threats were not shown. In other jurisdictions motions for change of venue are granted all the time—on the simple ground that against the defendant there runs a pervasive community feeling—in communities and on occasions in which there is no threat or thought of violence.

A generation ago the Alabama Supreme Court reversed—upon the sole ground that it was error to deny a change of venue—the conviction of a negro indicted for an atrocious rape upon a white girl. It said:

> "The crime charged was of a character to produce the greatest public indignation. The trial was had within a short time after the alleged commission of the offense came to the knowledge of the public—as soon as a special term of the court, called in obedience to a public demand for a speedy punishment, could be convened and held. And the affidavits and other evidence show that the public were so greatly aroused against the defendant that it required the promptest and most vigorous action of the executive officers of the State, from the Governor down, and including the

*The Arkansas Court's "answer to the objection that no fair trial could be had in the circumstances" is,—"it could not say 'that this must necessarily have been the case'" (261 U. S., at 91). The phrase Justice Holmes puts in quotation marks betrays the underlying fallacy of the State Court's opinion in the *Moore* case.

military, to protect the defendant from mob violence and summary execution; and further, that this state of feeling continued down to and through the trial, and must have had such effect upon the jury as that their verdict was little else than the registration of the common belief of the people that the defendant was guilty, and a mode of carrying out the public purpose to take his life. The trial was not and could not, under the circumstances then existing, have been fair and impartial. The court erred in denying the change of venue moved for by defendant, and for that error its judgment must be reversed" (*Thompson* vs. *State*, 117 Ala., 67, 68).*

III.

The reference to the time of trial.

The defendants were not ready on April 6. The issue of time is therefore even more important than the issue of place. The Chief Justice points this out (Po., 171-2). But the majority say very little about the issue of time.

(a) The essential reliance is upon the circumstance that no motion for continuance was made (Po., 161). Moore's counsel too made no such motion. This Court's deduction was not that the client had thereby lost his right to due process of law. Its deduction—drawn in large part from the very circumstance that motions ob-

*The majority opinion discusses the *Thompson* case. The opinion declares generally that distinction exists, but states no circumstance of distinction (Po., 157). In the same connection it discusses, and in the same way it dismisses, both *Moore* vs. *Dempsey* and the very recent decision of the Fifth Circuit in *Downer* vs. *Dunaway* (Po., 158; see *supra*, p. 46).

viously needful were not made—was on the contrary that the trial had been unfair and that constitutional rights had been denied.*

(b) The nearest the Court comes to a consideration of the *merits* of the time issue is in the reference to the Czolgosz case (Po., 164). There is not analogy between the Czolgosz case and the cases at bar; there is antithesis. Czolgosz's crime was "committed in the presence of thousands of citizens;" the issue in the cases at bar was whether "the evidence is to be believed" (Po., 164).**

The State Court's attitude toward premature trial is the opposite of the attitude this Court has expressed. The sole fact of hasty trial may, in an "extreme case," constitute "a denial of due process of law" (*Franklin* vs. *South Carolina*, 218 U. S., 161, 168).***

**Downer* vs. *Dunaway* is in accord. The Circuit Court of Appeals in the Fifth Circuit released on *habeas corpus* a negro tried for rape the day counsel was assigned. Judge Bryan cited the circumstance that "no motion was made for a continuance" as evidence that there was no real trial and no real representation by counsel (53 F. [2d], at 588-9).

Lack of zeal in assigned counsel, Judge Bryan said, "cannot be attributed to appellant who had no choice in the selection of his counsel." To like effect is the declaration by this Court in *Neal* vs. *Delaware* (103 U. S., at 396): "Indulgence"—where the issue is of constitutional right—must be shown to a negro "who was too poor to employ counsel of his own selection."

**An interesting bit of judicial history shows how anomalous were Czolgosz's crime and prosecution. Since the present Constitution of New York was adopted "there has been but one capital case in New York which was not appealed to the Court of Appeals,—that of Czolgosz" (Committee on Amendment of the Law of the Association of the Bar of the City of New York, Bulletin 1 of 1924, pp. 5-6).

***For the analysis of numerous state court decisions upon hasty trial, see Report No. 11 of the National Commission on Law Observance and Enforcement, *Lawlessness in Law Enforcement* (Government Printing Office, Washington, 1931), pp. 273-8.

* * *

Neither upon the point of place nor upon the point of time nor upon any aspect of the issues will this Court be bound by the construction the State Court put upon the facts. The cases come to this Court upon minimum facts which are in no dispute. The rights to orderly trial, to counsel, to protection against discrimination by reason of race, are guaranteed by the federal Constitution. The issues are of federal law. Upon such issues this Court—"examining the entire record" and applying to the facts as they there appear its tests of federal right—will make its own decision.*

*See, *e. g.*,

Kansas City Southern Ry. vs. *Albers Com. Co.*, 223 U. S., 573, 591;

Norfolk & Western Ry. vs. *West Virginia*, 236 U. S., 605, 610.

CONCLUSION.

The issue is of due process in the germinal sense,—of the Constitution's command that the law's own *process* be due. The issue is of the law's equal protection to the race for whose protection the Fourteenth Amendment was written into the organic law. The issue is of just that persecution and discrimination in matters of liberty and life that the Amendment forbids. The Chief Justice of the State found that "these defendants did not get that fair and impartial trial that is required by the Constitution" of the State. No less exacting are the standards set, and the requirements of due process and equal protection imposed, by the Constitution of the United States.

The judgments of the Alabama Supreme Court should be reversed.

Dated, September 16, 1932.

Respectfully submitted,

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APPENDIX.

ALABAMA CODE OF 1928.

"§3258. *Assignment or joinder of error unnecessary; duty of court.*—In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant."

* * *

"§5202. *Objections to indictment for defect in grand jury; when not available; exceptions.*—No objection can be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court."

* * *

"§5203. *When such plea filed; is sustained, new indictment preferred; limitation of prosecution.*—A plea to an indictment, on the ground that the grand jurors by whom it was found were not drawn in the presence of the officers designated by law, must if accused has been arrested be filed at the session at which the indictment is found, and if accused has not been arrested, it must be filed at the first session at which it is practicable

after defendant's arrest; and in all cases before a plea to the merits; if sustained, the defendant must not be discharged, but must be held in custody or bailed, as the case may be, to answer another indictment at the same or the next term of the court; and the time elapsing between the first and second indictments, in such case, must not be computed as a part of the period limited by law for the prosecution of the offense."

* * *

"§5407. *Punishment of rape.*—Any person who is guilty of the crime of rape must, on conviction, be punished, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years."

* * *

"§5567. *When Counsel appointed for defendant in capital case.*—If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours."

* * *

"§5570. *Trial, joint or several, at the election of either defendant.*—When two or more defendants are jointly indicted, they must be tried, either jointly or separately as either may elect."

* * *

"§5579. *Change of venue; trial removed on defendant's application, etc.*—Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is

found; which application must be sworn to by him and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the supreme court or court of appeals shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the low court on said application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court."

• • •

"§5580. *Trial judge may ex mero motu order change of venue.*—The trial judge may, with the consent of the defendant, ex mero motu, direct and order a change of venue as is authorized in the preceding section, whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence."

• • •

"§6088. *Appeals from decision on motions for new trials.*—Whenever a motion for a new trial shall be granted or refused by the circuit court or probate court, in any civil or criminal case at law, either party in a civil case, or the defendant in a criminal case may except to the decision of the court and shall reduce to writing the substance of the evidence in the case, and also the decision of the court on the motion and the evidence taken in support of the motion and the decision of the court shall be included in the bill of exceptions which shall be a part of the record in the cause, and the appellant may assign for error that the court below improperly granted or refused to grant a new trial, and the

appellate court may grant new trials, or correct any error of the circuit court and court of like jurisdiction, or probate court in granting or refusing the same. And no presumption in favor of the correctness of the judgment of the court appealed from, shall be indulged by the appellate court."

* * *

"§8630. *Objections to indictments; how taken.*—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court."

* * *

"Rule of Practice 31. *Severance in criminal cases.*—Where two or more persons, charged with a capital offense, are jointly indicted, either of them is entitled to demand a severance; but such right shall be considered as waived, unless claimed at or before the time of arraignment, or, at latest, when the court, at any term, sets a day for the trial of the case, and makes an order to summon a special venire. In other than capital offenses, a severance may be demanded at any time before the case regularly goes to the jury" (Rules of Practice of the Circuit and Inferior Courts of Common Law Jurisdiction, Alabama Code of 1928, p. 1938).